S. Hrg. 100-1058

CAMPAIGN FINANCE REFORM

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

SECOND SESSION

ON

S.J. Res. 21

A JOINT RESOLUTION PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES RELATIVE TO CONTRIBUTIONS AND EXPENDITURES INTENDED TO AFFECT CONGRESSIONAL AND PRESIDENTIAL ELECTIONS

S.J. Res. 130

A JOINT RESOLUTION PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES RELATIVE TO LIMITING CAMPAIGN EXPENDITURES

AND

S.J. Res. 166

A JOINT RESOLUTION PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES RELATIVE TO CONTRIBUTIONS AND EXPENDITURES INTENDED TO AFFECT CONGRESSIONAL, PRESIDENTIAL, AND STATE ELECTIONS

MARCH 17, 1988

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CAMPAIGN FINANCE REFORM

THURSDAY, MARCH 17, 1988

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room D-628, Dirksen Senate Office Building, Hon. Howell T. Heflin, presiding.

Also present: Senators Thurmond, Hatch, and Specter.

OPENING STATEMENT OF SENATOR HOWELL T. HEFLIN

Senator HEFLIN [presiding]. This hearing will come to order.

I would like to take this opportunity to thank all the witnesses, whom I am sure will be outstanding in expert testimony. I know the chairman of the Subcommittee on the Constitution, Senator Simon, would like to have been here today, but he indicated he was occupied in other endeavors. I am delighted to serve in his absence and perhaps if I wore a bow tie instead of my Irish green tie today nobody would know the difference.

For the record, I would like to state I am a supporter of a constitutional amendment to provide Congress with the authority to implement spending limits for Federal elections and I am a cosponsor of the joint resolution that has been introduced by my friend and colleague from South Carolina, Senator Hollings.

The cost of running a campaign for Federal office has escalated beyond reason and, unfortunately, often prohibits candidates or potential candidates who are not personally wealthy from waging a realistic bid for the office.

This circumstance is unfortunate because it denies capable and responsible citizens the privilege of serving their country in public office and limits the pool of capable, qualified, responsible candidates from which the citizens of our country can choose their public servants.

National election laws need to be reformed and spending limits should be imposed; and a constitutional amendment in my opinion is the best way to accomplish this important goal.

I would like at this point to put in the statement of the chairman, Senator Simon.

[The prepared statement of Senator Simon follows:]

STATEMENT OF SENATOR PAUL SIMON

Chairman, Constitution Subcommittee
Hearing on Campaign Finance Reform
March 17, 1988

I am pleased to convene the Constitution Subcommittee this morning to consider proposals for a constitutional amendment for campaign finance reform. I thank my colleague, Senator Heflin, for his generous assistance in chairing this hearing.

I have long been interested in the issue of campaign finance reform, and have supported the efforts of the Majority Leader in this area, because I believe it is fundamental to the integrity of the democratic process. Campaign spending, and campaign fundraising, have gotten out of control, and no Senator, no Member of Congress, can help but be affected by it. When political campaigns are financed by the rich and powerful, the temptation is to be responsive to them, rather than to the poor and powerless who need our help but don't have PACs. We need to address the perception that public policy is on the auction block. While I think this is not yet the reality, this is where we are headed if we don't move to protect the process.

The proposals before the Subcommittee would amend the Constitution to permit Congress to legislate reforms in the current system of campaign financing. S.J.Res. 21, introduced by Senator Hollings, would permit Congress to regulate contributions and expenditures intended to affect elections to Federal offices. S.J.Res. 130, introduced by Senator Roth, allows Congress and the states to establish reasonable limitations on expenditures with respect to candidacy for certain Federal and State offices. S.J.Res. 166, introduced by Senator McConnell, allows Congress and the States to regulate personal and independent expenditures to advocate or oppose a candidate for Federal or State office.

These proposals are all in the form of constitutional amendments, in response to the decision of the U.S. Supreme Court in Buckley v. Valeo, holding restrictions on campaign expenditures in violation of the First Amendment. The Subcommittee will hear statements from the sponsors of these measures (Senator Hollings, Senator Roth, and Senator McConnell), as well as Senator Cranston, Senator Kassebaum, and Congressman Schumer. In addition, the Subcommittee will hear from three particularly expert witnesses: Lloyd Cutler, Esq., former White House Counsel to President Carter and Chairman of the Committee on the Constitutional System; Walter Dellinger, Professor of Law at Duke University School of Law; and Joel Gora, Professor of Law at Brooklyn Law School, who will testify on behalf of the American Civil Liberties Union.

I am looking forward to this morning's testimony, an important step in addressing this serious problem.

Senator **Heflin**. Senator Thurmond, do you have an opening statement you would like to make?

Senator **Thurmond**. I have no opening statement. I understand this is a constitutional amendment offered by Senator Hollings which I believed I cosponsored.

Senator **Hollings**. You are a cosponsor.

Senator **Thurmond**. I think Senator Hollings is on the right track and I would be glad to cooperate with him.

Senator **Heflin**. We are very pleased to have such a distinguished group of witnesses to testify here.

This committee has a 5-minute rule. We do not have an unlimited debate rule, and if you can summarize your remarks, your written statements will be entered into the record. We might be a little lenient and go over a minute or two on some of the testimony as to the time involved in this. But we are delighted to have each of the witnesses here.

Senator Hatch is here. Do you have an opening statement?

Senator **Hatch**. I do and I would ask it be placed in the record, Mr. Chairman, and I appreciate being here.

[The prepared statement of Senator Hatch, along with the text of S.J. Res. 21, S.J. Res. 130, and S.J. Res. 166, follow:]

STATEMENT OF SENATOR ORRIN G. HATCH

SUBCOMMITTEE ON THE CONSTITUTION

S.J. RES. 21, CAMPAIGN FINANCING

THE FIRST AMENDMENT TO THE CONSTITUTION STATES THAT "CONGRESS SHALL MAKE NO LAW . . . ABRIDGING THE FREEDOM OF SPEECH." THIS SWEEPING GUARANTEE OF FREE SPEECH HAS LONG SERVED AS THE LINCHPIN OF INDIVIDUAL LIBERTIES IN OUR CONSTITUTIONAL SYSTEM.

ALTHOUGH IN NO WAY LIMITED TO POLITICAL EXPRESSION AND ASSOCIATION, THE FIRST AMENDMENT, IN THE WORDS OF THE SUPREME COURT, "HAS ITS FULLEST AND MOST URGENT APPLICATION PRECISELY TO THE CONDUCT OF CAMPAIGNS FOR POLITICAL OFFICE." MONITOR PARROT V. ROY (1971). IN LINE WITH THIS REASONING, THE SUPREME COURT APPLIED THE FIRST AMENDMENT TO INVALIDATE SEVERAL FORMS OF CAMPAIGN REGULATIONS IN THE BUCKLEY V. VALEO (1976) CASE. AGAIN, IN A MORE RECENT CASE, THE SUPREME COURT AFFIRMED THAT THE FIRST AMENDMENT PREVENTS CONGRESS FROM RESTRICTING INDEPENDENT POLITICAL EXPENDITURES. FEC V. NCPAC (1985). THE SUPREME COURT STATES SUCCINCTLY THE IMPORTANCE OF THE FIRST AMENDMENT IN THE ARENA OF CAMPAIGN REGULATION: "DISCUSSION OF PUBLIC ISSUES AND DEBATE ON THE QUALIFICATIONS OF CANDIDATES ARE INTEGRAL TO THE OPERATION OF THE SYSTEM OF GOVERNMENT ESTABLISHED BY OUR CONSTITUTION. THE FIRST AMENDMENT AFFORDS THE BROADEST PROTECTION TO SUCH POLITICAL EXPRESSION." BUCKLEY AT 13.

NONETHELESS THIS CONSTITUTIONAL AMENDMENT PROPOSAL WOULD EMPOWER CONGRESS TO DO PRECISELY WHAT THE FIRST AMENDMENT HAS PREVENTED. THESE PROPOSALS WOULD GRANT CONGRESS PLENARY CONTROL TO REGULATE POLITICAL EXPRESSION AND ASSOCIATION IN CAMPAIGNS. IN THIS SENSE, THESE PROPOSALS ARE DESIGNED TO EXEMPT ONE FORM OF SPEECH FROM FIRST AMENDMENT PROTECTION. IRONICALLY, THESE PROPOSALS WOULD CARVE OUT THE BILL OF RIGHTS PROTECTION FOR THAT FORM OF SPEECH DEEMED BY THE SUPREME COURT TO BE THE "FULLEST AND MOST URGENT APPLICATION" OF THE FIRST AMENDMENT.

S. J. RES. 21 STATES THAT CONGRESS WOULD HAVE POWER TO "ENACT LAWS REGULATING THE AMOUNTS OF CONTRIBUTIONS AND EXPENDITURES INTENDED TO AFFECT ELECTIONS TO FEDERAL OFFICE." THIS BROAD GRANT OF POWER RAISES COUNTLESS QUESTIONS ABOUT DAMAGE TO INDIVIDUAL RIGHTS TO SPEECH AND ASSOCIATION. WHILE I CANNOT DETAIL ALL THE POTENTIAL FORMS OF DAMAGE THIS LANGUAGE ENCOMPASSES, I AM TROUBLED BY AT LEAST THE FOLLOWING POSSIBILITIES UNDER THIS PROPOSAL:

** COULD CONGRESS, UNDER POWERS CURRENTLY DENIED BY THE FIRST AMENDMENT BUT GRANTED BY THIS PROPOSAL, PROHIBIT A CANDIDATE FROM SPENDING HIS OWN PERSONAL FUNDS TO FURTHER HIS PERSONAL CAMPAIGN? THE LANGUAGE OF S. J. RES. 21 WOULD ALLOW THAT ACTION AND IT MIGHT EVEN BE CONCIEVABLE THAT CONGRESS MIGHT WISH TO DEPRIVE A BILLIONAIRE OF AN INHERENT ADVANTAGE IN POLITICAL CAMPAIGNS. THUS, FOR THE FIRST TIME, CONGRESS WOULD DENY CANDIDATES THE RIGHT TO PURCHASE RADIO TIME OR NEWSPAPER SPACE TO TELL VOTERS THEIR POSITION ON ISSUES. THIS AMENDMENT WOULD EMPOWER CONGRESS TO LIMIT THE MOST VITAL FORMS OF DEBATE AND EXCHANGE OF VOTING INFORMATION.

** COULD CONGRESS LIMIT OR ELIMINATE INDEPENDENT POLITICAL EXPENDITURES? THE LANGUAGE OF S. J. RES. 21 WOULD ALLOW THAT ACTION AND INDEED CONGRESS HAS EVEN ATTEMPTED THIS ONCE. FORTUNATELY IN THE FEC V. NCPAC CASE, THE SUPREME COURT PERMITTED INDIVIDUALS TO CONTRIBUTE TO INDEPENDENT POLITICAL ENTITIES REPRESENTING ISSUES FROM NUCLEAR DISARMAMENT TO SCHOOL PRAYER. UNDER THIS PROPOSAL, CONGRESS COULD DENY AN INDEPENDENT CAMPAIGN THE RIGHT TO LOBBY FOR NUCLEAR DISARMAMENT OR FOR SCHOOL PRAYER.

** UNDER THE "INTENDED TO AFFECT ELECTIONS" STANDARD, COULD CONGRESS OUTLAW ANY EXPENDITURES TO PUBLISH RATING SERVICES WHICH GRADE THE PERFORMANCE OF MEMBERS OF CONGRESS? BY ITS LANGUAGE, THE PROPOSAL PERMITS THIS RESULT, BUT AGAIN, THIS WOULD CHILL THE MOST FUNDAMENTAL FORM OF POLITICAL DEBATE AND COMMUNICATION. EVERY ORGANIZATION FROM LABOR UNIONS TO CORPORATIONS, FROM SINGLE ISSUE ADVOCACY GROUPS TO POLITICAL PARTIES, COULD FIND THEIR ACTIVITIES AND EXPENDITURES REGULATED BY CONGRESS OR SOME FEDERAL BUREAUCRACY.

THIS IS JUST A PRELIMINARY LIST OF POTENTIAL PROBLEMS. THE FUNDAMENTAL QUESTION RAISED BY THIS AMENDMENT IS "IN WHAT WAYS HAS THE FIRST AMENDMENT FAILED US?" THIS PROPOSAL IS PREMISED ON THE NOTION THAT THE CURRENT SYSTEM OF OPEN DEBATE AND EXCHANGE OF IDEAS UNDER THE FIRST AMENDMENT IS FLAWED. I VIGOROUSLY DISPUTE THE NOTION THAT WE MUST CREATE AN EXCEPTION TO FIRST AMENDMENT FREE SPEECH PROTECTIONS FOR POLITICAL CAMPAIGNS. TO THE CONTRARY, CAMPAIGNS ARE THE "FULLEST AND MOST URGENT APPLICATION" OF THOSE FREEDOMS.

100TH CONGRESS
1ST SESSION

S. J. RES. 21

Proposing an amendment to the Constitution of the United States relative to contributions and expenditures intended to affect congressional, and Presidential elections.

IN THE SENATE OF THE UNITED STATES

JANUARY 20, 1987

Mr. HOLLINGS (for himself, Mr. HEFLIN, Mr. CRANSTON, Mr. DODD, and Mr. STEVENS) introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States relative to contributions and expenditures intended to affect congressional, and Presidential elections.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the following article is proposed as an amendment to the Constitution of the United States, to be valid only if ratified by the legislaturs of three-fourths of the several States within seven years after the date of final passage of this joint resolution:

“ARTICLE —

“SECTION 1. The Congress may enact laws regulating the amounts of contributions and expenditures intended to affect elections to Federal offices.”.

II

100TH CONGRESS
1ST SESSION

S. J. RES. 130

Proposing an amendment to the Constitution of the United States relative to limiting campaign expenditures.

IN THE SENATE OF THE UNITED STATES

MAY 15 (legislative day, MAY 13), 1987

Mr. ROTH introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary

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JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States relative to limiting campaign expenditures.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution if ratified by the legislatures of three-fourths of the several States within the seven-year period following the date of submission to the States for ratification:

"ARTICLE —

"Congress may by law establish reasonable limitations on expenditures made by any person with respect to the candidacy of any person for the Office of President, Vice President, Senator, Representative, or any other office within its jurisdiction. The several States may by law establish reasonable limitations on expenditures made by any person with respect to the candidacy of any person for any other office within their respective jurisdictions.".

II

100TH CONGRESS
1ST SESSION

S. J. RES. 166

Proposing an amendment to the Constitution of the United States relative to contributions and expenditures intended to affect congressional, Presidential, and State elections.

IN THE SENATE OF THE UNITED STATES

JUNE 19, 1987

Mr. MCCONNELL introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary

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JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States relative to contributions and expenditures intended to affect congressional, Presidential, and State elections.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress:

"ARTICLE —

SECTION 1. The Congress may enact laws regulating the amounts of expenditures a candidate may make from his personal funds or the personal funds of his immediate family or may incur with personal loans, and Congress may enact laws regulating the amounts of independent expenditures by any person, other than by a political committee of a political party, which can be made to expressly advocate the election or defeat of a clearly identified candidate for Federal office.

SECTION 2. The several States may enact laws regulating the amounts of expenditures a candidate may make from his personal funds or the personal funds of his immediate family or may incur with personal loans, and such States may enact laws regulating the amounts of independent expenditures by any person, other than by a political committee of a political party, which can be made to expressly advocate the election or defeat of a clearly identified candidate for State and local offices.".

Senator HEFLIN. Senator Hollings, you are the author of this constitutional amendment. We would be delighted to hear from you at this time.

STATEMENT OF A PANEL CONSISTING OF ERNEST F. HOLLINGS, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA; MITCH McCONNELL, A U.S. SENATOR FROM THE STATE OF KENTUCKY; WILLIAM V. ROTH, JR.; A U.S. SENATOR FROM THE STATE OF DELAWARE; ALAN CRANSTON, A U.S. SENATOR FROM THE STATE OF CALIFORNIA; NANCY LANDON KASSEBAUM, A U.S. SENATOR FROM THE STATE OF KANSAS; CHARLES E. SCHUMER, A REPRESENTATIVE FROM THE STATE OF NEW YORK

STATEMENT OF SENATOR ERNEST F. HOLLINGS

Senator HOLLINGS. Mr. Chairman, I thank very much.

I wish for you to accept my statement and I will summarize very quickly.

I am privileged to appear before you and my distinguished cosponsor, Senator Thurmond. I will not belabor the point, but I want to highlight two points: one about the deliberate nature we went about in adopting a constitutional approach and otherwise the other solutions haven't been tried. I want to emphasize that this comes in after we have tried all the rest.

With respect to the Constitution, you do not amend the Constitution at every problem and we are fully aware of it, respectful of it. Those who have studied it over the years, for example, the Committee on the Constitutional System, on which our distinguished colleague, Senator Kassebaum, was a member of the board of directors. We have Mr. Cutler, its attorney. We also have the attorney for the American Civil Liberties Union that submitted the briefs in the *Buckley* v. *Valeo* case. All of the authorities have been looking at this problem and are coming now to one conclusion.

As we have had in the last four or five constitutional amendments to address election issues, certainly not just the material of qualification and otherwise. Now more than anything else concerning the people is the cost. It has gotten outrageously high. With that in mind we have tried with S. 2 on the floor of the U.S. Senate with a cloture vote. We who dutifully support this particular approach remained quiet to give the S. 2 approach, particularly with that idea of public financing, which I have opposed, but I wanted to give it a full airing without any opposition or confusion from this particular approach, the S. 2 closure votes, and it's not going to occur and if it were passed in the next 10 minutes the likelihood would be Presidential veto.

What we really need is to restore freedom of speech under the Constitution in politics. Freedom of speech in politics. The Court in the *Buckley* v. *Valeo* decision equated money with speech and I have to agree with them. I have been elected five times to the U.S. Senate and money talks. If you have got money, you have got the freedom. If you do not have the money, Senator, you got the freedom to shut up.

It is a distorted decision in the sense that those who give it, their freedom of speech is controlled. They limit it. I who receive it and spend it, my freedom is uncontrolled. More than $1 million or even if I have $1 million and the other candidates got $10 to $15 million—and there are over two dozen candidates in the last several years spending $10 to $15 million—I can veritably my $10 to $15 million and your small amount take away your freedom of speech. You become regardless of the issue, your stance and your record, looked upon as a disinterested, lethargic type candidate in the public view.

So it is that we want to do right, not to solve the problem. I have another colleague here who would talk just about the rich and that is true. In 1973 the full intent was to disallow the rich from buying the office. I never forget the debates. I participate in them. In 1973 we were saying the rich were not going to buy the office and under *Buckley* v. *Valeo* they are the only ones that can.

I want to solve the amount of money. You see, I have always taken the view that it is not the amount of participation, since the jaycees and junior chamber participate, participate, participate, participate. Now the little folks, whether they be nurses or teachers, this little group or that little group, get together in a political action committee.

I happen to think that is healthy. I think once it is listed as it can be and should be under the 1973 law as to where your money comes from and where you spend it, if I get all the money from Texas and you get it all from oil and you get all of it from the special interests, the public sees it and can make its judgment.

But the overall limit must be enforced. Senator Thurmond and I collected and spent over $2 million. We never have found Senator Thurmond's opponent. But it was necessary for him to avoid a last minute surge of contribution. We have had candidates being given a million bucks right then aimed at television and everything of that kind.

So you campaign defensively and instead of waiting until the election year or the year before to collect, you start collecting and then talking for your colleagues and 6 years expended, and 25 percent of your time as a Senator is not studying the issues, but it is out working, talking, talking, working, electing, collecting, to get on TV, collecting to get on TV, collecting to get on TV, and it is gotten to the point we have taken the politics out of campaigns. You do not see people. You do not listen to them unless they got money. I went around last year after I had been elected overwhelmingly in 1986. I spent 1987 with town meetings to go back and see people that I just frankly didn't have time for.

That is the disgrace. I am a professional politician. I have been in politics 40 years, and I hate to have to come to point where I do not even have time to listen unless you got money. This thing has got to be corrected and the Congress should have that power to restore freedom of speech in politics by being allowed under this constitutional amendment to control and otherwise regulate expenditures in federal elections; and I think our distinguished friend, Mr. Cutler, will also bring in an amendment relative to State elections.

I see the red light and I will be glad to answer any questions.

Senator **Heflin**. Senator Thurmond, you have said you had to leave. Do you wish to ask any questions now?

Senator **Thurmond**. I do not have any questions. I favor the amendment. I want to thank Senator Hollings and the others who have come here this morning to testify.

Senator **Heflin**. Senator Hollings, let me ask you this. Because of the Supreme Court decision, *Buckley* v. *Valeo*, is there any way other than a constitutional amendment that you feel that could be addressed or which would address the results as you have articulated?

Senator **Hollings**. No. You tried it and what you do is end up with a discombobulation. You entice people to self-imposed limits and that is the thrust of S. 2. And you can see how that broke down. I mean Senator Byrd and Senator Boren gave it every particular point. Even if we spent a certain amount or our opponent spent a certain amount, I could not get to the independent groups that were coming in. Under this amendment you can. You still could not get to the rich under S. 2. The rich could still buy the office. I know of no other way that you correct that flow of decision in my opinion than the outright line in that Constitution that in Federal and, let's say, State elections, the Congress and all the State government would be empowered to regulator control expenditures. I know of no other way. Then Congress and the legislatures can come back and regulate as they wish.

Senator **Heflin**. In the constitutional amendment you would allow Congress to enact laws regulating the amount of contributions.

Senator **Hollings**. Yes, sir.

Senator **Heflin**. The amount of expenditures intended to affect elections. You have spoken primarily in regards to cost. What do you see is the need for regulating the amount of contributions and the expenditures? Are both of those needed in a constitutional amendment or would one suffice, the amount of expenditure, or do you feel in the way of a constitutional amendment Congress needs to have the authority to regulate the amount of contributions and expenditures, making the distinction between contributions and expenditures?

Senator **Hollings**. Right. I think the distinction should be had. We worked with the Congressional Research Service and constitutional authorities and we tried different ways to word it. The bottom line is this was only an authority to the Congress and it does not write the election law. There are some, perhaps within this panel, my own colleagues and cosponsors, some 21 in all, who had different ideas about how to regulate or what to regulate. We do not settle that question. We just want the Congress to have that authority constitutionally, and thereafter we can pass whatever that particular Congress might pass as the bill that maybe I did not like in the second or last instance.

But I think the authority for both expenditures and contributions should be included.

Senator **Heflin**. Senator Specter, do you have questions?

Senator **Specter**. Thank you, Mr. Chairman, just a few.

Senator Hollings, do you know of any other effort to amend the first amendment to the U.S. Constitution?

Senator **Hollings**. No, sir.

Senator SPECTER. Do you have any concern as to the precedent of seeking to amend the first amendment, which is probably the most important constitutional provision—it's hard to pick out a most important part of the Constitution, but it would be hard to pick a part which is more important than the first amendment. Do you have any concern about getting involved in changes of the first amendment, considering the very basic and important provisions contained there in.

Senator HOLLINGS. After careful study, Senator Specter, I had a concern and I realized that would not be easy because, as your question indicates, those thoughtful persons that revere the first amendment, and I include myself in that group as well as you, say just do not tinker with that and there is no way to look upon this particular amendment other than an embellishment of and really a strengthening of the first amendment rather than taking away from the first amendment. I just happen to believe that the *Buckley* v. *Valeo* decision, if you read what Associate Justice White said or Justice Marshall in their dissenting opinions, you will see the approach, unrealistic approach to freedom of speech given by the majority opinion.

So, after listening to the constitutional authorities and everything else, I felt rather encouraged and bolstered by the idea that I was not taking away or limiting but rather strengthening the first amendment, freedom of speech.

Senator SPECTER. I appreciate your answer, Senator Hollings. It is a concern on my mind.

I thought the *Buckley* decision was a bad decision. Just a very brief personal aside. I was a candidate in a primary for the U.S. Senate in 1976, and I filed after checking my bank account, which had about $35,000 which was the limit that could be spent in a primary election for a State the size of Pennsylvania, and in late January 1976 the decision came down saying that candidates could spend millions. Some did. I thought that it was an unrealistic limitation to say that my contributors could not contribute more than $1,000. My brother could not contribute more than $1,000. But my opponent could spend any sum and the independent contributions are highly questionable because they have been not in collaboration with the candidate and that is so hard to establish; and if you have somebody making independent contributions to your campaign that can really foul up your candidate. You do not exactly want that somebody in. So it is very troublesome.

But a concern I have is, as you put it, tinkering with the first amendment and one man's improvement is another man's radical change. So it is hard to say. I just have one other question, but I wanted to make that brief personal observation.

Your amendment goes only to Federal elections. Given the constitutional issue which would prohibit State elections from having the same kind of a *Buckley* limitation, if we only give Congress the authority to limit federal elections, we have not dealt with the problems in states where States want to limit the amount an individual can spend of his or her own money in State elections. Why not make this amendment applicable to State elections as well, giving State governments the authority to regulate State elections?

Senator HOLLINGS. It should, Senator, and it must. I have only been corrected and educated by our distinguished lawyer, Mr. Cutler, that the *Buckley* decision impacts upon State elections as well as Federal. I did not realize that. I was trying to make it as simple and uncontroversial as I possibly could, but I have to agree with Mr. Cutler that the decision of *Buckley* v. *Valeo* impacted upon it. And the answer to your question is positively yes. We can change that word to include not only Federal offices only but Federal and State offices.

Senator SPECTER. I thank you, Senator Hollings, and I commend you for being in the forefront of this issue, as you are on so many issues in our Senate.

Senator HOLLINGS. Thank you, Senator. Can I add one thing that has not been asked, that should be clarified immediately. It is not an amendment for incumbency, and I have heard that criticism; and we only have to go to the experience in the 1986 election whereby incumbency was not necessarily a blessing. Those with less money defeated the incumbents in North Carolina, Virginia, Florida, Alabama, Louisiana, North Dakota, South Dakota, and Washington. Let's put that in the record. Those with less money defeated those incumbents, Republican and Democrats.

So I think we have answered most of the questions. I do appreciate your courtesy in hearing me.

[Prepared statement of Senator Hollings follows:]

Sen. Ernest F. Hollings
March 17, 1988

TESTIMONY IN SUPPORT OF S.J. RES. 21, THE CONSTITUTIONAL AMENDMENT TO PERMIT LIMITATIONS ON EXPENDITURES IN FEDERAL ELECTIONS

BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION, U.S. SENATE COMMITTEE ON THE JUDICIARY

Mr. Chairman, I appreciate this opportunity to speak on behalf of S.J. Res. 21. As the distinguished Chairman is well aware, this bill would amend the Constitution with the simple declarative sentence: "The Congress may enact laws regulating the amounts of contributions and expenditures intended to affect elections to Federal offices." I am pleased to speak on behalf of a bipartisan coalition of 21 Senators who currently support this Constitutional amendment, including the distinguished senior senator from Alabama.

Mr. Chairman, last month the Senate failed for the seventh time to cut off debate on S.2, the Byrd-Boren campaign finance bill. Realistically speaking, that bill is dead for the duration of the 100th Congress.

Though I supported the most recent cloture motion, I fundamentally disagree with S.2's emphasis on public financing and radical restrictions on political action committees. Surely, our task is not to find "fairer" or "less corrupting" ways of raising the obscene sums that fuel

Federal election campaigns. Our task is to impose strict limits on how much total money a candidate can spend. And that is precisely the thrust of S.J. Res. 21. S.J. Res. 21 presents the Senate with a constructive, bipartisan, viable alternative to S.2. It also represents our last, best hope of legislating campaign finance reform during the 100th Congress, in time for the 1990 election. On that score, let me say that I am especially pleased to have Sen. Byrd and Sen. Boren among the cosponsors of S.J. Res. 21.

Mr. Chairman, the Senate faces unfinished business in the field of electoral reform. Fourteen years ago, in the Federal Election Campaign Act Amendments, Congress provided for public financing of presidential elections and set political contribution and spending limits for candidates in Federal elections. Regrettably, in the case of Buckley v. Valeo, the Supreme Court struck down the spending limits provision of the law. The court held that spending limits would curb the freedom of candidates to express themselves in the political marketplace.

The Supreme Court was right about one thing--the issue is money. Their reasoning, however, is flawed. It goes like this: free speech is good, money is one component of free speech, therefore, the more money we have, the more free speech everyone has. Nothing could be further from the truth.

This ivory tower view of free speech ignores the real world. In fact, the type of speech the Court endorses in *Buckley v. Valeo* is anything but free, and the real loser is responsive, effective government. With all the time it takes to raise the huge sums necessary to run for office in this day and age, it is impossible for elected officials not to be distracted from the work of government. In addition, these huge sums cannot help but to be ultimately corrosive. All of us hope that there are no votes for sale, and there probably not on a tit for tat basis. But as you continue to be surrounded by those who can provide the cash that fuels today's political campaigns, their concerns, not those of the average voter, begin to take on more significance. That is why I make a point to make a mill shift and hold town meetings after I have just been elected, not before. But there are only 24 hours in a day and as costs continue to explode, the time pressures of juggling the job of governing, of meeting with voters, and of raising campaign bucks will only increase.

In its ruling, the Court purported to defend freedom of speech. In reality what it said is this: Yes, if you have personal wealth or if you are well-heeled with PAC money, then you have access to television, you have freedom of speech. But if you do not have personal wealth or big PAC money, then you are denied access to television. Instead of freedom of speech, you have only the freedom to shut up.

Mr. Chairman, every man and woman in this chamber realizes that television advertising is the name of the game in modern American politics. In warfare, if you control the air, you control the battlefield. In politics, if you control the airwaves, you control the tenor and focus of a campaign.

Probably 80 percent of campaign communications take place through the medium of television. And most of that TV airtime comes at a dear price. In South Carolina, you're talking $2,400 for 30 seconds of prime-time advertising. In New York City, you're talking some $30,000 for the same 30 seconds.

The hard fact of life for a candidate is that if you're not on TV, you're not truly in the race. Wealthy challengers as well as incumbents flush with PAC money go directly to the TV studio. Those without personal wealth are sidetracked to the time-consuming pursuit of cash.

Buckley v. Valeo created a double bind. It upheld restrictions on campaign contributions, but struck down restrictions on how much candidates with deep pockets can spend. The Court ignored the practical reality that if my opponent has only $1,000 to spend in a race and I have

$100,000 or $1 million, then I can effectively deprive him of freedom of speech.

Justice Thurgood Marshall zeroed in on this disparity in his dissent to Buckley v. Valeo. By striking down the limit on what a candidate can spend, Justice Marshall said, "It would appear to follow that the candidate with a substantial personal fortune at his disposal is off to a significant head start."

Indeed, Justice Marshall went further: He argued that by upholding the limitations on contributions but striking down limits on overall spending, the Court put an additional premium on a candidate's personal wealth.

Justice Marshall was dead right. Our urgent task is to right the injustice of Buckley v. Valeo by empowering Congress to place caps on Federal campaign spending. We are all painfully aware of the uncontrolled escalation of campaign spending. The average cost of a Senate race was $1.1 million in 1980, rising to $2.1 million in [illegible], and skyrocketing to $3 million in 1986. To raise that kind of money, the average Senator must raise money at the rate of $10,000 a week every week of his six-year term. Senators from large states such as California and New York are obliged to raise three or four times that amount. At best, this obsession with money distracts us from the people's business. At worst, it corrupts and degrades the entire political process.

I have run for statewide office many times in South Carolina. You establish a certain campaign routine, say, shaking hands at a mill shift in Greer, visiting the big country store outside of Belton, and so on. Over the years, they look for you and expect you to come around. They say, "Here he comes again. It must be election time." But in recent years, those mill visits and dropping by the country store have become a casualty of the system. There is very little time for them.

During my 1986 reelection campaign, I found myself raising money to get on TV to raise money to get on TV to raise money to get on TV. It's a vicious cycle. The rule was, if you had money, I had the time to meet with you.

After the election, I held a series of town meetings across the state. Friends asked, "Why are you doing these town meetings? You just got elected. You've got six years." To which I answered, "I'm doing it because it's my first chance to really get out and meet with the people who elected me. I didn't get much of a chance during the campaign. I was too busy raising bucks."

I remember Senator Richard Russell saying: "They give you a six-year term in this U.S. Senate: two years to be a statesman, the next two years to be a politician, and the last two years to be a demagogue." Regrettably, we are no longer afforded even two years as statesmen. We proceed straight to demagoguery right after the election because of the imperatives of raising money.

S.J. Res. 21 would change all this. It would empower Congress to impose reasonable spending limits on Federal campaigns. For instance, we could impose a limit of, say, $700,000 per Senate candidate in a small state like South Carolina -- a far cry from the $2.2 million I spent in 1986.

Moreover, once we have overall spending limits, then it matters little whether you get money from industry groups, or from PACs, or from individuals. It is still a modest amount any way you cut it. Spending will be under control, and we will be able to account for every dollar coming in and every dollar going out.

To a distressing degree, elections are determined not in the political marketplace but in the financial marketplace. Our elections are supposed to be contests of ideas, but too often they degenerate into megadollar derbies, paper chases through the boardrooms of corporations and special interests.

Campaign spending must be brought under control. The constitutional amendment I have proposed would permit Congress to impose fair, responsible, workable limits on Federal campaign expenditures.

Such a reform would have four important impacts. One, it would end the mindless pursuit of ever-fatter campaign war chests. Two, it would free candidates from their current obsession with fundraising and allow them to focus more on issues and ideas. Three, it would curtail the influence of special interests. And four, it would restore freedom of speech so that its exercise is not contingent upon being wealthy.

Finally, Mr. Chairman, a word about the advantages of the constitutional approach of S.J. Res. 21. Recent history amply demonstrates the practicality and viability of this Constitutional route. Certainly, it is no coincidence that four of the last five amendments to the Constitution have dealt with federal election issues. In elections, the process drives and shapes the end result. Election laws can skew election results, whether you're talking about a poll tax depriving minorities of their right to vote, or the absence of campaign spending limits giving an unfair advantage to wealthy candidates. These are profound issues which go to the heart of our democracy, and it is entirelyappropriate that they be addressed through amendment of the Constitution.

And let's not be distracted by the argument that the constitutional approach will take too long. Takes too long? We have been dithering on this campaign financeissue since early 1970. It has been 18 years now, and no conventional legislative solution has done the job.

The last five Constitutional amendments took an average of 19 months to be adopted. There is no reason why we cannot pass this Joint Resolution and ratify the Constitutional amendment in time for it to govern the 1990 election. Indeed, the amending the Constitution could prove more expeditious than the alternative legislative approach. Bear in mind that the final version of S.2 would be vulnerable to a Presidential veto. In contrast, S.J. Res. 21, once passed by the Congress, goes directly to the States for ratification. Once ratified, it becomes the law of the land, and is not subject to veto.

Mr. Chairman, I have been told that it will take a scandal to trigger campaign reform, yet we have as scandalous a system as you are likely to fin in place right now. S.J. Res. 21 will address the campaign finance mess directly, decisively, and with finality. The Supreme Court has chosen to ignore the overwhelming importance of media advertising in today's campaigns. In _Buckley v. Valeo_, it prescribed a bogus "if you have the money you can talk" version of free speech. In its place, I urge passage of S.J. Res. 21 so that we may ensure equal freedom of expression for _all_ who seek Federal office.

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Senator **Heflin**. Senator Cranston, we are delighted to have you here.

STATEMENT OF SENATOR ALAN CRANSTON

Senator **Cranston**. Thank you very much. I will be very brief. I am pleased to testify this morning in support of Senate Joint Resolution 21, offered by my friend Senator Hollings, on this vital issue that goes to the very heart of the our democratic system and the confidence of the people in its integrity.

I believe we must take action now to limit campaign spending. We cannot tolerate any longer the present system of escalating campaign costs. In 1986 congressional candidates spent $450 million to run for office. That represented a 500 percent increase in the amount of money spent in congressional elections in just 12 years. In my own case, I raised and spent over $13 million, the Democratic record for U.S. Senate races in American history. However, I was outspent by my Republican opponent who raised and spent over $15 million. That made the race in California the most expensive Senate race in American history, breaking the record set 2 years before in North Carolina. I expect the record that we set 2 years ago will be broken this year in some State.

I fully expect that even more money will be spent in the 1988 congressional elections. And unless we act now spending will be even higher in 1990, 1992, and 1994. I concur with the thoughts expressed by Senator Hollings. The present situation compels candidates, whether incumbents or challengers, to spend more than half their campaign time raising money from well-to-do people in order to reach everybody else by the remote concepts of television. That leaves them out of the system. I think that is one reason for the decline in participation in voting in this country, which I believe is a very dire threat to our democracy.

For the first 100 years of our history more and more people participated in elections. In the second 100 years there has been a drop in participation. Very consistently, for the last 100 years, and precipitously since 1960, there have been fewer and fewer people participating in elections. This decline is a real threat to our democracy. The worse figure I know is that in the recent House and Senate elections of 1986, 84 percent of young Americans 18 to 24 who were eligible to vote did not vote. If young people decide they do not belong in our system, our whole democracy is in danger. I think campaign finance is one, not the only one, but one of the reasons for this rising lack of participation in the ways and functions of our democracy. We have tried to limit campaign spending by passing legislation. But because of the *Buckley* v. *Valeo* decision, which Fritz Hollings referred to, this legislation had to contain some public financing to pass constitutionality muster.

Fifty-two members of the U.S. Senate cosponsored S. 2. I was one of them. We spent a good part of last summer trying to bring the Boren-Byrd bill before the Senate for a vote.

We tried again in the fall and we tried against last month. The majority leader tried eight times to invoke cloture on that legislation. Each time a determined minority voted against cloture. Unfortunately, it seems that we will not be able to pass a bill in this

Congress to limit congressional campaign spending. One of the reasons is because of the need to attach to the bill the controversial matter of public financing.

Passing a constitutional amendment would enable the Congress to set spending limits without the constraints imposed by the *Buckley* decision. Senate Joint Resolution 21 will give to Congress the constitutional authority to set contribution and expenditure limits in Federal elections.

It has been suggested that any limitation on campaign expenditures is automatically incumbency protection. I disagree. Expenditure limits for a congressional campaign should be and can be set at levels which enable all serious candidates, incumbents and challengers alike, in all States, small and large, to run competitive campaigns.

Some people argue that a constitutional amendment will take years to enact and that, therefore, we should focus on other approaches to campaign finance. But the fact is that the last four successful constitutional amendments took an average of only 12 months to be ratified. The 26th amendment, the most recent constitutional amendment, was ratified in just 4 months. This amendment, which Fritz Hollings and I and others have offered, if passed by the Congress, can be acted upon quickly by the States. The amendment can be ratified in time for the Congress to undertake to set spending limits for the 1990 congressional elections without necessarily having to make a controversial matter still more controversial by including a public financing component.

The passage of this constitutional amendment obviously will not solve all the problems of our current congressional campaign finance system. We must continue to work for legislation to reform campaign finance.

We must continue to work for a system of campaign finance which is not perceived to be dominated by special interests and wealthy individuals. We must continue to work for a system of campaign finance which restores the role of political parties in Federal elections.

However, let me finally say, passage of this constitutional amendment is a necessary first step in the process of reforming the system of financing congressional elections in our country. We must act. We must act now. To perpetuate the current system would be to avoid our responsibilities to create a system of campaign finance which is fair, reasonable, and equitable, both in perception and in practice.

Thank very much.

Senator HEFLIN. Thank you.

Senator Specter, do you have any questions?

Senator SPECTER. One or two perhaps.

Senator Cranston, you and I and Senator Simon sat down on this constitutional amendment a year ago, talking about prompt hearings. I do not want to talk about what has happened in the past, but I think it is worth just a little conversation about why did not we proceed with this a year ago? Why did we have to wait until S. 2 went down before we took the issue up? Wouldn't it have been more sensible to proceed on a dual track at that time?

Senator CRANSTON. Yes, I would like to have done that, and frankly I do not know why we were unable to. It may have been that the Judiciary Committee was distracted by Supreme Court nominations and was spending most of its time on those.

Senator SPECTER. The Judiciary Committee was distracted by anything and we were ready and able to have hearings on this subject. It seems too bad we did not get to that a long time ago because I think even Senator Simon's schedule would have accommodated a hearing and Senator Heflin could have presided. I know I was ready at any time to proceed.

Senator CRANSTON. That is a matter for the committee, and I am not on the committee, as you know.

Senator HEFLIN. Senator Hollings, you want to comment on that.

Senator HOLLINGS. I think Senator Cranston's answer is more politic. We all know Senator Byrd, the majority leader, and he wanted to get a full, good, honest trial on his S. 2 approach and in all fairness to Senator Byrd and Senator Boren, who were cosponsors on this, Senator Simon indicated there was no chance of hearing on this before the subcommittee. I asked and I asked and I asked and I more or less got indirectly the message that we do not have to have any confusion or distract from S. 2. And if and when we finally cannot pass S. 2, then we will come to your bill and that is the agreement we had to make. I had to wait my turn.

Senator SPECTER. I think that is the reality. There was a decided effort to avoid any pushing of this issue in another line which might have distracted from S. 2's possibility of success and I think it is unfortunate, because we could have been far ahead.

Senator CRANSTON. Now that we are at this point, let's move.

Senator SPECTER. I am prepared to move. But I do not think it will delay it unduly to spend 3 minutes discussing that slight bit of history.

Senator CRANSTON. You are not empowered to mark up at this moment anyway.

Senator SPECTER. Pursuing that still for 30 seconds more, S. 2 has established a lot of precedent. Today is a fairly complicated day with Honduras and the Intelligence Committee hearings; and I reported dutifully here because I was in doubt as to what powers of arrest might lie on the premises if a subcommittee ranking member did not appear for these hearings; but I am prepared to stay and proceed and get it done very promptly.

Let me raise one other subject with you, Senator Cranston, on the practicalities which we have already gotten into. There may be some people who will want to know what is down the road in terms of what's going to happen on campaign finance reform.

A big item on the merits seems to me is the issue of soft money. It does not directly impact on the specific language of the constitutional amendment, but it lurks very much in the background.

It might be, and I am not talking about my own vote, because my strong inclination is to support this constitutional amendment. As I told you, we met a year ago and were willing to work for its earlier adoption; but I think a fair inquiry as to what may happen down the road indicates there may be some in the Senate and the House who would be influenced by the issue of soft money.

By that, as you know, but for the record, say that it chose door-to-door solicitation, telephone banks or in kind contributions where the Democrats in a realistic sense have a significant advantage over the Republicans.

My question after that preliminary is why not include those soft contributions both as to reporting and as to limitations on spending or contributions?

Senator CRANSTON. I think that is a matter to be explored as the legislation is considered, not the constitutional amendment but as legislation is considered.

Senator SPECTER. I think it should be explored and that is what I am doing right now. I would like to explore it with you. What do you think?

Senator CRANSTON. There are various kinds of soft money expenditures used for various purposes. I do not know what all those purposes are and I do not recall all the kinds. I think there should be a look taken at that subject. I believe there have been abuses. I think some were corrected by legislation that was in the tax bill last year due to concerns of Congressman Jake Pickle of Texas. There was language adopted, and it is now law, that places certain restrictions on the use of soft money.

Senator SPECTER. I will not pursue it any further now, Senator Cranston. There is some temptation to say how telephone banks or how about door-to-door solicitation or particularize them and get your views because you are at the forefront of this movement on campaign reform as I have been, but I think it is worthy of some thought and I think it is worthy of some consultation and consideration. I would not like to see a filibuster defeat a constitutional amendment. I would not like to see the 45 to 41 Senators aligned. It may be that if we could come to terms on an outline of campaign reform and I think that soft money is a very big, very legitimate issue because it is directly equated with cash and it is very significant, and I see no reason why it should not be tabulated and counted, limited just like cash because it is that important. We do not have to decide it. We cannot decide it at the moment, but I raise it for our further consideration.

Senator CRANSTON. Could I ask what sort of phone bank operations or door-to-door solicitations you are referring to or concerned with?

Senator SPECTER. Sure. I am referring to phone banks which are manned by organizations in support of candidates where those funds do not count as contributions under existing law. I am talking about canvassers who go around door to door in a systematic way as was done in the May 1986 campaign where organizations organized people in a door-to-door fashion to go around and talk to voters and to solicit money. I am talking about handouts at election day by organizations in a systematic way. And I am not talking about individuals who are exercising their first amendment rights. I am talking about an organized plan by an organization to help a candidate. They spend money on it, they hire the door-to-door solicitors, and pay for telephones, they pay for telephone callers. And that has very tangible monetary results. I hire people to respond to that. The contributions I got were where people were limited, where it had to be reported. It seems to me that is a very,

very big factor that ought to be taken into account. It may well be that we could have the same kind of a logjam we had on S. 2. I hope not but I think this is the big issue these days.

Senator **Cranston**. I think those matters should be looked at. Frankly, I do not know how you could get binding commitments on matters relating to action that would be taken prospectively at the time that you are considering the constitutional amendment.

Senator **Specter**. I will take your word for it, Senator Cranston. I am not looking for something in writing under seal. We sit down and talk it over and come to terms, I think we could rely on one another in that kind of a meeting. Thank very much, Senator Cranston.

Thank you, Mr. Chairman.

[The prepared statement of Senator Cranston follows:]

TESTIMONY OF SENATOR ALAN CRANSTON

S.J. RES. 21

SENATE COMMITTEE ON JUDICIARY, SUBCOMMITTEE ON THE CONSTITUTION

MARCH 17, 1988

Mr. Chairman, I am pleased to testify this morning in support of S.J. Res. 21. This constitutional amendment will restore to Congress the power to set expenditure limits in federal elections, a power which was taken away by the Supreme Court in Buckley v. Valeo in 1976.

We must take action now to limit campaign spending. No longer can we tolerate the present system of escalating campaign costs. In 1986 congressional candidates spent 450 million dollars to run for office. That represented a 500% increase in the amount of money spent in congressional elections in just twelve years. I fully expect that even more money will be spent in the 1988 congressional elections. And, unless we act now, spending will be even higher in 1990, and 1992, and 1994.

We have tried to limit campaign spending by passing legislation. Because of the Buckley v. Valeo decision, that legislation had to contain some public financing to pass constitutional muster. Fifty two members of the United States Senate cosponsored S. 2. I was one of those members. We spent a good part of last summer trying to bring the Boren-Byrd bill before the Senate for a vote. We tried again in the fall. We tried again last month. The majority leader tried eight times to invoke cloture on that legislation. Each time a determined minority voted against cloture. Unfortunately, it seems that we will not be able to pass a bill in this Congress to limit congressional campaign spending.

Passing a constitutional amendment would enable the Congress to set spending limits without the constraints imposed by the Buckley decision. S.J. Res. 21 will give to Congress the constitutional authority to set contribution and expenditure limits in federal elections.

We cannot afford to let another election cycle go by without campaign spending limits. The average winning Senate candidate in 1986 spent 3.5 million dollars. The average winning House candidate spent more than half a million dollars. In my own re-election campaign in 1986 I spent more money than any Democratic Senate candidate in the history of this country. Still, I was outspent.

Congressional campaigns have ceased to be opportunities for candidates to present their ideas to the people of their states and districts. More and more time must be spent with wealthy contributors and representatives of political action committees. Candidates are told by their campaign advisors to plan to spend fifty percent of their time, or more, fundraising. Time spent campaigning is time taken away from talking to voters, time away from sharing ideas with constitutents, and yes, for incumbents, time spent away from the work of the House and Senate.

We must stop what Senator Byrd has called "the money chase." Senator Simpson recently described us as a "bunch of bagmen running all over the United States." We must take action now to control the exorbitant costs of running for federal office. The passage of this constitutional amendment will restore Congressional power to set spending limits.

It has been suggested that any limitation on campaign expenditures is automatically incumbent protection. I disagree. Expenditure limits for congressional campaigns should be, and can be, set at levels which enable all candidates, incumbents and challengers alike, in all states, large and small alike, to run competitive campaigns.

Some people argue that a constitutional amendment will take years to enact. This simply is not true. The last four successful constitutional amendments took an average of 12 months to be ratified. The 26th Amendment, the most recent constitutional amendment, was ratified in just four months. This amendment, once passed by the Congress, can be acted upon quickly by the states. The amendment can be ratified in time for the Congress to set spending limits for the 1990 congressional elections. Finally, we will be able to bring the escalation of spending in congressional elections under control.

The passage of this constitutional amendment will not solve all of the problems of our current congressional campaign finance system. We must continue to work for campaign finance reform. We must continue to work for a system of campaign finance which is not perceived to be dominated by special interests and wealthy individuals. We must continue to work for a system of campaign finance which restores the role of political parties in federal elections.

However, passage of this consitutional amendment is a necessary first step in reforming the system of financing congressional elections in this country. We must act, and we must act now. To perpetuate the current system would be to avoid our responsibilities to create a system of campaign finance which is fair, reasonable, and equitable, both in perception and in practice.

Senator **Heflin**. Senator Kassebaum, we would be delighted to hear from you.

STATEMENT OF SENATOR NANCY LANDON KASSEBAUM

Senator **Kassebaum**. I would like to have my statement made part of the record.

I am here as a strong cosponsor of Senate Joint Resolution 21. I salute Senator Hollings' efforts to lead this endeavor and those who are following us as witnesses will make the legal arguments, I think like Lloyd Cutler, who has spent much time and talent in thinking about constitutional questions. He will speak eloquently on the subject.

But the very, very questions Senator Specter has elicited or raised and tried to elicit some answers on I think show that even if we pass Senate Joint Resolution 21, which I think is important in answering the question of public financing, which I do not support either and it is a means to get around that problem, show that we have to have legislation to implement what indeed we are trying to accomplish with campaign limitations. And that is not going to be an easy task.

We found it true when we were debating S. 2. And the very questions you raised, I think, Senator Specter, indicate we will have to go around and find the means of implementing the limitation.

So it is just the beginning of the process. But I think an important beginning, because I have felt for some time that the efforts that have continued to grow and expand over the last even, I think it would be fair to say, 8 years have and are sapping a lot of vitality out of the political system. We find ourselves here spending an awful lot of time just on receptions and fund raisers. I think that is not a productive use of our time.

I think more importantly it really does tend to cut out the grass roots participation I think is important. Saying all that, I am pleased to be able to lend my support to the efforts of Senator Hollings and others today.

Thank you, Mr. Chairman.

Senator **Heflin**. Senator Specter, do you have any questions of Senator Kassebaum?

Senator **Specter**. I would like to commend Senator Kassebaum for her very thoughtful approach as usual. She has been a leader in campaign reform. I know the difficulties of walking into the well of the Senate and being one of two or three or four who put the marks on one side of the Republican line and Senator Kassebaum did that as a matter of conscience on the filibuster vote and I would just like to commend her and thank her.

Senator **Kassebaum**. Thank you.

Thank you, Mr. Chairman.

[The prepared statement of Senator Kassebaum follows:]

Statement on S.J. Res 21
A Constitutional Amendment on Campaign Finance
Before the Constitution Subcommittee
of the Senate Committee on the Judiciary
By Senator Nancy Landon Kassebaum
March 17, 1988

Mr. Chairman, I'm pleased to be here today to testify in support of S.J.Res. 21, which was introduced by Senator Hollings last year. As a cosponsor of this legislation, I am convinced that it is a necessary step in the process of bringing the soaring costs of our political campaigns under control.

I am not here to offer a finely tuned legal argument for this constitutional amendment. Undoubtedly that task will be done very capably by other witnesses. Instead, I believe the best case for this legislation is made simply by looking at the current system of campaign finance.

You do not have to be an expert to reach two immediate conclusions. One, if you want to run for public office today, you have to raise and spend a lot of money. Two, if you want to be reelected to public office, you have to raise and spend a lot of money.

S.J.Res. 21 seeks to remedy this problem, and I believe it is rapidly becoming a very serious problem, by giving to Congress the power to regulate contributions and expenditures for federal elections. The language of the amendment is as simple and straightforward as the goal.

Unfortunately, as we all learned from the protracted debate over S. 2, the problems of campaign finance are far from simple. The competing interests and the conflicting demands of our political life are difficult to comprehend, let alone reconcile.

Over the past two years, I have been involved in efforts to build a bipartisan consensus to deal with this problem. Invariably, these efforts have run into the problem set out by the Supreme Court in its 1976 ruling on Buckley v. Valeo, which struck down a law imposing expenditure ceilings on federal campaigns.

Mr. Chairman, I know you and others members of this subcommittee are well acquainted with this ruling but I want to briefly restate its key conclusion. The court found that, absent some form of government financing, expenditure ceilings violated the First Amendment guarantees of freedom of speech and association and were therefore unconstitutional. As a result of this ruling, every effort to deal with the problems of campaign finance has turned into a contorted and tortuous affair.

The Supreme Court recognized the troubling reality of the current system--in order to effectively exercise one's freedom of speech, one must spend large sums of money on expensive media efforts such as television advertising. In a very real way, this puts freedom of speech--or perhaps more accurately the freedom to be heard--on the auction block with the most freedom going to the highest bidder. The results can be seen all around us as our political dialogue increasingly is dominated by the need to raise money and the ability to spend money. Another less visible result is that the average citizen's right to freedom of speech, and right to be heard, is being sharply and dramatically devalued.

In short, Mr. Chairman, I believe that the growing power and influence of money in our political campaigns is weakening the most fundamental link in our democracy, the link between the elector and the elected. I believe it is essential that we find a way to reverse this process.

By itself, S.J. Res. 21 cannot fully do this job. If two-thirds of the House and Senate approved this amendment and if three-fourths of the state legislatures were to ratify it, Congress would still have to come up with legislation to implement it.

This would not be an easy job, but this legislation can make that job easier by allowing Congress to develop a comprehensive solution that contains none of the gimmicks and subterfuges employed in past efforts as a way to deal with the Supreme Court's decision.

Senator **Heflin**. Senator McConnell, we are delighted to have you here, and we will hear from you now.

STATEMENT OF SENATOR MITCH McCONNELL

Senator **McConnell**. Thank you, Mr. Chairman.

Mr. Chairman, Senator Specter, in looking over the witness list, I wanted to make certain that the committee is aware that there is a substantial opposition to a constitutional amendment limiting campaign expenditures. I would just like to read into the record the names of a number of scholars who feel that the constitutional amendment or any kind of limitation on expenditures is bad for public policy.

Among those who have written in opposition to spending limits: Austin Rammey of the University of California at Berkeley; Herbert Alexander of the University of Southern California; Larry Sabato of the University of Virginia; Richard Scamon, American University; Christopher Arterton, formerly head of Harvard University's John F. Kennedy School of Government; Michael Malbin, American Enterprise Institute; Gary Jacobson, former Woodrow Wilson Fellow; Joel Fleischman, formerly of Harvard's John F. Kennedy School of Government; Jonathan Moore, director of Harvard's Institute of Politics; and Richard Neustadt, professor of government and founding director of the Harvard Institute of Politics and former consultant to Presidents Truman, Kennedy, and Johnson.

One is pretty hard pressed these days to find knowledgeable scholars who think that expenditure limitations are a good idea. Of course, the inevitable result of a constitutional amendment, as Senator Specter indicated, is to tamper with the first amendment, providing Congress the opportunity to create a system akin to what we have in the Presidential system. I would like to point out some of the results of that, Mr. Chairman.

Since we have put taxpayer financing and spending limits into the Presidential system, one out of four campaign dollars are budgeted for lawyers and accountants. In the 1980 Presidential race, $21.4 million was spent on compliance alone, as much as the most expensive race in Senate history. Some campaigns today process each contribution through as many as a hundred steps. Political decisions in effect have become accounting decisions.

Under this system of spending limits, ironically, there has been unprecedented growth in spending. Overall spending in Presidential races now increases at the same rate as before spending limits and taxpayer financing were made a part of that system. The difference is that far more spending is now done outside legal limits and outside of disclosure.

Every major Presidential candidate since 1976 has been cited for serious violations of the law, and received bad press and large fines as a result. One candidate, by his own campaign manager's admission, spent $2 million in a State with a $400,000 limit. Campaign managers report that the first planning priority is to identify in advance ways to circumvent limits and rules. A respected observer of campaign financing declared, "I think this whole FEC thing is a sham. If you're not finding every loophole, you're not doing your job."

In the 1984 Presidential general election, special interest spent $25 million to oppose President Reagan—62 percent of Reagan's $40 million general election spending limit. Nearly half of the money that was spent in the 1984 general election, $72 million, was outside the candidates' direct control. At least one-fourth of all money spent in Presidential races is unreported, unlimited, and unaccounted for. Soft money spending, that Senator Specter made reference to, is roughly tripling each election cycle. Races resemble the uncontrolled corrupt politics of the pre-reform era.

I heard, during the S. 2 debates on the Senate floor, several of my colleagues saying there is a scandal waiting to happen. Mr. Chairman, the scandal waiting to happen is not the way we elect the Members of Congress; it is the way we elect Presidents.

I would like to submit for the record an interesting article called "Counseling a Presidential Campaign." This was written by three people whose credentials include service at the FEC, where they were on the "compliance" side, and service with the Mondale for President Committee—and I do not single him out for any particular reason other than that is who they worked for. The authors finally were able to wrap up the Mondale campaign about 3 years after it was over. This is an article about the nightmare we have created in the Presidential system.

I think it is worth taking a look at this article, so I will ask that be made a part of the record, Mr. Chairman.

Senator McConnell. First of all, what is it we are trying to cure by tampering with the first amendment—what great wrong? The great wrong is the spending of money in political campaigns. There is a notion that somehow this is an outrageous exercise.

Let me point out that the overall growth in campaign spending has been dropping dramatically. From 1976 to 1978, total spending on House and Senate campaigns went from $115.5 to $194.8 million; that was a 70-percent increase. From 1980 to 1982 total spending went from $239 to $342.4 million; that was a 43-percent increase. From 1984 to 1986, spending in House and Senate elections went from $374.1 to $450 million, a 20-percent increase.

It is true that campaign costs have tripled in the last 10 years, as we all know because of the cost of television. But that is something we can treat without getting anywhere near a constitutional amendment. Further, the rate of increase has dropped dramatically, by over 70 percent in the last 10 years. As congressional campaigns absorbed the new expensive media technologies, the sudden spending increases of the late seventies and early eighties have subsided.

Also, I have heard a number of my colleagues, who apparently have a bias against television, say we should get back to the way we used to do it. I heard that from Senator Cranston. I wonder how long it would take Senator Cranston to shake the hand of everyone in California, and I wonder if that handshake would be a meaningful exchange on the issues of the day.

In fact, we cannot turn the clock back. Only if you happen to be fortunate to represent a very small State is it possible to develop any kind of relationship with your constituents through personal contact.

In fact, television is here. In fact, it is costly. I think we ought to do something about the cost of it. We can certainly do it without tampering with the first amendment.

Now, to put things in context, in 1986, Americans spent $211 million in electing members to the Senate and a total of $450 million to choose all their leaders for our National Government. Is that too much to spend for an important purpose? Is that spending too much to educate voters on the people who will be deciding the issues of national significance? Is that too much? Compared to what?

We spent $23 billion on cosmetics last year; $55.4 billion for alcoholic beverages; and $121.4 billion for eating out. The Senate's $211 million even pales in comparison with the $230 million Americans spent on bottled water; $883 million was spent advertising cosmetics. That was the top six companies alone. And $20 million was spent advertising Kibbles n' Bits and Ken-L Rations. These camparisons should answer the question of whether we're spending too much choosing our Nation's leaders. Our investment in democracy is a pittance compared to consumer spending.

Now, what are we trying to do here in tampering with the Constitution?

We are trying to put an arbitrary limit on how many people can participate through limited cash contributions to campaigns. Is that something we want to do, just because we have decided that somehow too much is being spent in campaigns? Most scholars who follow this believe that too little is being spent in campaigns, provided it comes from people who contribute a limited amount of money and it is fully disclosed.

I happen to share the view of the Senator from Pennsylvania about the so-called millionaire's problem. I wish we could solve that. That is the part of *Buckley* v. *Valeo* that I find frustrating. But there are some ways of getting at that legislatively.

However, to tamper with the Constitution to cure that problem, and create for the Congress an opportunity to put a limit on how many people can participate by giving limited, disclosed cash contributions is, I think, a terrible, terrible idea.

Senator SPECTER. I do not want to interrupt your train of thought, Senator, but will you yield for a question?

Senator MCCONNELL. Sure.

Senator SPECTER. It is a friendly question. It might help to develop your contention.

I am interested that you agree with the concern I have expressed about the millionaire's problem. How would you deal with that legislatively? What alternatives do we have there?

Senator MCCONNELL. There are two legislative suggestions I made. One is original thought and the other one I think was initially suggested by Senator Domenici. My proposal is that you make it impossible for someone who puts their own money in a race to get it back. In other words, if you are going to ante up your own money to buy public office, at least you are going to have to eat the whole thing. After the election you cannot go around and shake down everybody you can find, PAC's and others, to pay your-self back. That is not going to solve the problem of a person who is quite wealthy, but at least it will discourage the person who is just a little bit wealthy.

The second thing I think we could do is to require the person who is going to spend, say, more than a quarter of a million dollars in his own behalf in a race, to so notify the FEC at the beginning of election. This notice would then trigger for his opponent the opportunity to receive more per individual than $1,000, which is at least to some extent going to even the landscape.

I would not have any problem with amending the Constitution with regard to the millionaire's problem. I do have a tremendous problem with amending the Constitution in a manner that gives Congress the authority to tell us how many people can participate in our campaigns with limited, disclosed cash contributions.

Senator SPECTER. Senator McConnell, let me proceed with this one question. If you solve the millionaire's problem, you then effectively enable Congress to legislate in the field, do you not, because the only reason that we talked about public financing was to compel people to accept the limitation. So that if the millionaire's problem is solved, if we have a constitutional amendment which would just direct, aside from the independent campaign contribution of somebody who may want to intervene and spend a lot of money, that would really enable Congress to legislate a cap, would not it?

Senator MCCONNELL. I would rather not amend the Constitution in this area, period. I find the millionaire's problem offensive, but I think we have to weigh that against the harm that is going to be done by giving Congress the authority to create another Presidential system. As I have said previously and will say again, if spending limits are established by Congress, the FEC will soon be as big as the Veteran's Administration. Also, it will be like the amendment to prohibit alcohol in this country. It simply will not work. It simply will not work and we have created once again an administrative nightmare and a new bureaucratic behemoth.

One other point I want to make, Mr. Chairman, and I know I am taking more time than I should——

Senator HEFLIN. If you would, we are going to try to adhere to the five-minute rule.

Senator MCCONNELL. Since it is often said that the expenditure of money is turning people off, I thought I would rebut that before I leave. In fact, the expenditure of money is turning people on. The races in which the most money is spent are the competitive races in which both sides are aggressive and well funded, and there is a direct correlation between that spending and high turnout.

South Dakota in 1986 is often cited as an example of the obscene amount of money spent per person, and there was a lot of money spent in South Dakota, $13.47 per voter. But South Dakota also had the highest voter turnout in the Nation. Clearly, the result of that race was an awful lot of people who became interested in the spirited contest. You can go right down the list: the races in which very little was spent were the races in which there was no interest and low turnout. I think we ought to put to rest once and for all the notion that somehow the expenditure of money and communication with the voters is turning the voters off. It is not. There is no evidence of that whatsoever. In fact, the evidence proves the total opposite conclusion.

Thank you, Mr. Chairman, for the opportunity to testify. I hope that we will not amend the Constitution to cure an ill that isn't there. There are some problems. Let me just say in summary that we could eliminate political action committees. If the American public thinks that special interests are having an undue influence on the process, then get rid of the PAC's. I will be more than happy to vote to eliminate PAC's altogether. If we are concerned about the cost of campaigns, and we certainly are, then let's do something about the cost of television. We can do that. We can require them to give us a real break in the 60 days before the general election and the 45 days before the primary.

Senator SPECTER. How much is real?

Senator MCCONNELL. I think we can sit down and negotiate that with them. They are in charge of the public airways, and I think we ought to require a meaningful discount from them. I think that is an entirely appropriate thing to do and that will bring a lot of relief to fundraising.

The final point I would make is the reason that fundraising is time-consuming is because of contribution limits. I happen to think contribution limits are good public policy, that we limit contributions to $1,000 in the primary and $1,000 in the general, but the inevitable result is that you have to work harder. You have to talk to more people. I do not think it is bad to have to talk to a lot of people.

Also, regarding this business about big contributions: there are not any big contributions in American politics, $1,000 in the primary, $1,000 in the general. The average Republican contribution in the country is $300. That is not corrupting the process. If something is corrupting the process, it is the PAC's, so let's get rid of them. It does not require a constitutional amendment to do that. We could do it tomorrow.

Thank you very much, Mr. Chairman.

I appreciate the opportunity.

Senator HEFLIN. Do you have any questions, Senator Specter?

Senator SPECTER. No, just a comment to note Senator McConnell's leadership in this area, the tremendous amount of time he has spent on the Senate floor which is immeasurable and the obviously tremendous amount of time he has spent studying this issue and working on it which is important. Thank you, Senator.

[Articles submitted by Senator McConnell follow:]

COUNSELING A PRESIDENTIAL CAMPAIGN

By LYN OLIPHANT* PAT FIORI MICHAEL S. BERMAN

The date is January 3, 1987. It is four years from the day that the Mondale for President Committee registered with the Federal Election Commission (FEC)and 26 months since the campaign was over.

Inside a small office, piled high with files and boxes, sit two deputy counsel of the Mondale campaign. A few miles away in another office the committee's treasurer periodically meets with his lawyers and reviews documents passing to and from the Federal Election Commission. These three people (the authors of this article) plus a part-time controller and a part-time secretary are all that is left of the Mondale for President campaign, a campaign which for most people has been long since over.

In the past, we have all been reasonably confident that the Federal Election Commission Act (FECA) is a workable solution to the admitted and potential problems which plague the area of the campaign financing. Now we are troubled by a campaign finance law which is used as a campaign weapon; spawns "creative" efforts to comply with—really evade—its limits; has made presidential campaign fundraising increasingly burdensome; and has led to rules which in our view sometimes make no sense and inhibit healthy campaign activity.

For those of us responsible for the campaign's compliance with the Federal Election Campaign Act of 1971, as amended,[1] the path from registration of the committee in 1983 until today has been a long and frustrating one. It is our hope that by sharing some of our experiences and highlighting some of the unresolved questions, the trail will be easier for future campaigns.

A Broad Range of Issues

A broad range of legal issues arises throughout the course of a presidential campaign. While the primary emphasis is on election law, there are a number of other legal matters that also require attention; for example, tort liability, contracts, equal employment opportunity laws, corporate law, copyright questions and communications law. These problems range from weighty legal questions to those that sound more like the script of a television sitcom.

For example, during 1984, Mondale staffers and volunteers backed a rented truck into a cathedral in San Francisco, damaging both; clipped a wing off an airplane with another truck; broadsided a cow with a rental car (the cow was held liable); and drove another rental car the wrong way down a one-way street into an oncoming fire engine with its siren on and lights flashing. A routine day also included a request for permission to market a "Gerry" wig.

With such a range of legal problems, it is important for a campaign treasurer and the campaign's counsel to find as much volunteer legal help as possible. There is a need for those who may be able to spend large amounts of time and those with critical expertise, but who are only available for telephone consultations and an occasional meeting.

When the campaign is in full swing, in-house lawyers and campaign management can easily lose perspective. Invaluable to us were two seasoned practioners who were there to reason with or pitch in during times of crises.

One of the key questions confronting the treasurer is how to structure the internal campaign organization in order to facilitate compliance with the law. From a legal standpoint, the treasurer is the key person in the campaign because that person is responsible for FECA compliance.[2] The treasurer is, in essence, the client and, for this reason, the jobs of treasurer and counsel should never be filled by the same person.

A second key element in fostering compliance is a good accounting system. It should be in place before any financial activity occurs. Whether to maximize matching funds[3] or to stay within expenditure limits,[4] a solid accounting system is essential.

Unresolved Questions

Campaign organizations tend to push the limits of permissible election finance activity. Practices and legal interpretations adopted in one presidential cycle become the new jumping off point for the next cycle, raising new questions concerning the reach of the federal election laws.

1.—Delegate Committees

Frequently these new frontiers of campaign activity are the subject of FEC compliance actions, often when a candidate's opponent files a complaint. This happened to the Mondale campaign and the much-publicized delegate committees.[5] One of the central questions posed in that matter before the FEC concerned the permissibility of delegate committees engaging in the same activities as individual delegates under the FEC's delegate regulations.[6]

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Under the regulations, delegates may make expenditures for grassroots activity such as the production of literature which advocates their own selection as delegates and also advocates the election of their candidate.[7] These expenditures are not considered contributions to the candidate, nor are they subject to the candidate's expenditure limit. The Commission had previously issued an advisory opinion interpreting the grassroots activity provision as applicable to individual delegates and delegate committees.[8] However, in this instance in considering the delegate committee complaint the FEC was unable to reach a consensus as to whether the activity of the Mondale delegate committee fell within the parameters of the regulation.

The issue was not resolved in this matter because the campaign entered into a conciliation agreement with the Commission.[9] In late 1986, the Commission considered proposed staff revisions [10] to the regulations intended to clarify this question, but it has never adopted a notice of proposed rulemaking. Thus it is entirely possible that the ambiguity of these delegate regulations will not be resolved before the next campaign counsel must render advice on this question.

2.—Redesignation of Excessive Contributions

Another issue that was unresolved prior to the 1984 campaign and remains unresolved concerns the disposal of excessive contributions to the primary campaign.

Campaigns frequently receive aggregate contributions from an individual in excess of the $1,000 limit.[11] One option available to the campaign is to simply return the excess amount in a timely fashion.[12] This is not the most desirable course of action if there is some other lawful way in which the funds might be used by the campaign. A second option is to redesignate the excess amount to a general election compliance fund.

The FEC manual for publicly financed campaigns [13] published in 1983 does not address the question of what procedure a campaign must use to redesignate excessive primary contributions to the general election compliance fund. Unfortunately, the FEC did not resolve this question in its regulations in time for the 1984 campaign.

The issue is whether a campaign may simply notify a contributor that the excessive amount of his or contribution is being redesignated by the campaign or whether the contributor must sign a form agreeing to the redesignation. Both options were used by different campaigns in 1984.

In our view the most sensible resolution is to permit redesignation with notice by the campaign, so long as the contributor is given a period of time to request a refund.

If the FEC fails to resolve this issue, campaigns might consider including language in the original solicitation and on the contributor card specifying how excessive contributions will be redesignated or allocated.

3.—Sources of Funds for Repayments and Penalties

Neither the FECA nor the regulations make clear what funds can be used to make required payments of public funds.[14] The issue has been before the Commission on several occasions since 1976, yet remains unresolved.

In the aftermath of the 1984 campaign, the FEC took the position that repayments are neither qualified nor nonqualified campaign expenses.[15] Unless the Commission makes clear from what funds repayment may be made, candidates in 1988 will not know whether they will be able to make repayments from their regular campaign accounts, which include a mix of private and public funds.

The Commission has taken a clear position that civil penalties can only be paid publicly-funded campaigns from sources which do not include public funds.[16] Similarly, the Commission should take a position on the repayment question.

4.—Draft Committees

Through no fault of the FEC, the status of draft committees remains unresolved.

Persons involved in the Draft Kennedy movement prior to the 1980 presidential campaign refused to comply with subpoenas issued by the FEC on the grounds that the activity of the draft committees was beyond the purview of the FECA.[16] Meanwhile, the Congress made a minor change in the FECA's reporting requirements. The federal appellate courts confirmed the lower court decisions and interpreted the change in the law as subjecting draft committees to the reporting requirements but not the contribution limits.[18]

Congress, despite the FEC's repeated recommendations,[19] has not chosen to take further action, leaving the FEC essentially powerless to extend its control over draft committees.

Current Statutory and Regulatory Dilemmas

In certain respects the FECA was not designed nor has it been modified to deal with the passage of time. Certain of the regulations adopted by the FEC seem to deny the realities of modern-day campaigns, while others beg for a rationale. The net result is that the law has become substantially more burdensome than it needs to be to meet its overriding goals.

1.—Contribution Limits

The FECA limits contributions by individuals to $1,000 per election.[20] Had the contribution limits been indexed in the same manner as the expenditure limits, the individual limit in 1984 would have been more than $2,000. Fund raising is no longer a test of viability, it is a test of stamina. Candidates are forced to divert attention from issues and campaigning to raising money.

Because of the limits, potential candidates for president have turned to vehicles other than campaign committees to finance activity at the very early stages. First, it was the creation of independent multi-candidate political action committees (PAC's), which may accept $5,000 per year from individuals.[21] PAC expenditures do not count against any limit. Now, it is the organization of think tanks, which are tax-exempt, tax-deductible foundations.

The FECA does not serve its goals, and the real public interest does not benefit, when unrealistically low limits cause candidates to wear themselves out with fund raising and finding new vehicles to attract and spend money. Respect for the law and confidence in the integrity of campaigns is in no way enhanced by these activities.

If we are not careful, over time the FECA will go the route of all those campaign finance laws which preceeded it.

2.—Primary Matching Funds

Under the Presidential Primary Matching Payment Account Act, [22] a candidate seeking nomination by a political party may opt to accept public funding to match contributions which the candidate raises privately. After meeting certain threshold requirements, private contributions are matched with public fund up to the first $250 received from eac individual, up to an aggregate amoun equal to one-half of the expenditure limit.[23] The $250 matching amount has not increased since the 1976 campaign. The amount of matching funds the candidate may receive has doubled.[24]

Currently, contributions cannot be matched unless they are made and received after January 1 of the year before the election and before December 31 of the election year.[25] No matching funds are distributed to candidates until after January 1 of the election year.[26]

Presidential candidates should not be constrained by the campaign finance laws from beginning their campaigns early if they so choose. A candidate should be permitted to begin a campaign two or three years before the general election year if he or she is willing to register a committee at that time.

The end of the period during which private contributions are eligible for matching, December 31 of the election year, [27] is unrealistically short. Many candidates finish the primary season in debt. The period between the national conventions, which mark the end of the primary season, and the general election is the most difficult time for most candidates to raise primary funds. Candidates who have met the eligibility threshold for matching funds should be allowed to continue to raise contributions that qualify for primary matching funds until all debts, and winding down costs, have been met. At a minimum, the matchability period should be extended for a full year after the election.

Campaigns must be particularly mindful of the current limitations as they accumulate debts during the later stages of the primary campaign.

3.—Expenditure Limits

A presidential candidate who accepts public funds for the primary or general election is limited in the amount he or she can spend in those campaigns.[28] These limits are adequate to enable a candidate to mount a viable campaign. However, the FECA creates one limit on general campaign activity[29] (in 1984, $20.2 million) and a separate limit for fund-raising[30] (in 1984, just over $41 million).

The separate limit for fundraising serves no useful purpose. It greatly complicates record-keeping and compliance. And, candidates are encouraged to devise ways to bypass it. For example, when using the mail as a persuasion device to reach large numbers of voters, the inclusion of a pitch for funds transforms the cost of the letter into a fund-raising expense.

One limit combining the amount allowed for general campaigning with the amount allowed for fund-raising is more realistic, would void the need for such "creative" devices and, of equal importance, would ease bookkeeping.

4.—State-by-State Limits

The Presidential Primary Matching Payment Account Act and the FECA limit the amount that can be spent in each state by a presidential primary candidate who has opted for matching funds.[31] These state-by-state expenditure limits create an accounting nightmare, serve no useful purpose, and have no practical effect except in Iowa, New Hampshire, and perhaps, in Maine. These states have political and media importance well beyond their size but expenditure limits commensurate with their size.

Some have suggested that the current grassroots provisions are being exploited as a loophole. Moreover, the requirements of this law are so difficult to follow that they curb healthy campaign activity.

If a candidate wants to spend every nickel he or she can raise, in a small, early state on the theory that a win there will carry him or her much farther than a war of attrition, that should be his or her choice. These limits spawn the most creative efforts to evade the spirit, if not the letter, of the Act.

5.—Grassroots Expenditures

Provisions permitting certain grassroots activities by state and local party committees were added to the FECA in 1979.[32] Essentially, they permit political parties to engage in traditional party volunteer activities without the expenditures for those activities counting against the candidate's limits.

Some have suggested that the current grassroots provisions are being exploited as a loophole. Moreover, the requirements of this law are so difficult to follow that they curb healthy campaign activity. Add to this the fact that state laws and federal laws usually differ. It is easy to see why well-meaning volunteers get frustrated, and much spontaneous participation, so important to the process, is lost.

6.—Use of Private Aircraft

The FEC's regulations controlling the use of private, nonscheduled aircraft by federal campaigns are something to behold. By careful choice of airports and selection of aircraft based on who owns the plane (regular charter company or other corporation), the amount which a candidate pays for a trip may vary by tens of thousands of dollars.[33]

Revision of Public Financing Regulations

The Commission is considering significant revisions to its public financing regulations.[34] Some of these changes can have significant impact on the audit process and on the ultimate financial position of the campaign. The proposed changes to watch include:

- Shifting the burden to candidates to prove that reallocations by FEC auditors are incorrect[35]
- Requiring that taxes paid on any income earned from funds invested by the campaign be counted as expenditures subject to the overall expenditure limit[36]
- Considering expenditures incurred before the date of ineligibility[37] as non-qualified expenses if the goods or services are received after the date of ineligibility[38]
- Considering the costs of preparing the matching fund submissions as a fund-raising cost rather than a compliance cost[39]
- Requiring a campaign to have all assets appraised at the time of acquisition and at the time of disposal[40]
- Using the last-in-first-out method for determining when a candidate no longer has matching funds in his or her account[41]
- Changing the treatment of loans to publicly financed campaigns by various alternatives such as requiring certain types of security for such loans[42]
- Requiring a 100 percent repayment of non-qualified expenditures paid after the date of ineligibility.[43]

The Commission and Staff

At one time or another every presidential campaign will deal with the Commission, the General Counsel's office and Audit Division.

In each instance in which the Commission, itself, has considered matters specifically relating to our campaign, its decisions have been fair and reasonable. This is not to say that we like the outcome of every encounter with the Commission. It is to say that the results were reasonable in the circumstances.

Throughout the campaign, our lawyers, talking with the General Counsel's office, and our accountants, talking with the Audit Division, were accorded courteous and helpful treatment. We encourage every campaign to establish these lines of communication. However, you must keep in mind that your comments during these communications may be noted for the record by FEC personnel and used during an audit or investigation.

The Commission and its staff acted expeditiously during the campaign, when time was of the essence, in such things as certifying and delivering matching funds. However, the post-election audit process dragged on longer than should be necessary.

It is not clear to us whether the length of the post-campaign audit process is a function of the experience (or lack thereof) of some of the auditors, their practice of going beyond sampling in reviewing certain kinds of transactions, a lack of funding, or the propensity of the audit staff to constantly be searching for new theories under which transactions are/can be deemed improper. Whatever the cause, there has to be some way to complete it more quickly.

There are several changes that would likely speed up the process. First, the FEC should adopt regulations and require adherence to strict time deadlines for the completion of audit work and the staff review. Second, the audit should not be commenced and, at least, shouldn't be brought to even a preliminary close until the bulk of the financial activity has been completed. In no case should the audit of a successful primary candidate begin until after the general election. Third, allocate less time to state limits. As much as 50 percent of staff audit time may be devoted to the state limits, which essentially means reviewing expenditures in Iowa, New Hampshire and Maine.[44] While the Commission does have an obligation to enforce the state limits, this does not seem like an appropriate allocation of audit time, given the size of the total campaign.

Because presidential campaigns are a unique animal in the election law firmament, perhaps the Commission and the campaigns would be well served by using major accounting firms to handle this audit under the supervision of the Audit Division.

Serving as Treasurer

The FECA requires that a campaign have at least one officer, a treasurer.[45] No contribution can be received or expenditure made when that post is vacant.[46] Oftentimes the title of treasurer is given as an honor to a prominent supporter. However, in our view, treating the job of treasurer as an honorific rather than as an operating position is a mistake for the campaign and for the individual seeking or accepting the "honor."

Treasurers will be found by the Commission to have violated the Act, in their official capacity, if the campaign committee is found to have violated the law, whether or not the individual has taken any specific action which violates the law.[47] The Commission's theory seems to be that some individual must be accountable for the activities for the campaign. With that theory as a premise, the only alternative to holding the treasurer liable would be to hold the candidate liable, and that policy would not likely last longer than the time it took the ink to dry on the document proposing it.

The fact of the matter is that no campaign treasurer can maintain sufficient day-to-day control over the operation of a large campaign spread over 50 states, so as to assure that no provision of federal law is violated.

Anyone who accepts the position of **treasurer should assume that there is a better than 50/50 chance that he or she will at least be cited in his or her official capacity, for violating the FECA. The day may come when no reasonable person will accept this responsibility.**

Conclusion

Eventually, every campaign completes its responsibilities under the Act, the last report is filed, the last box of records is placed in storage and it is over. In our case that may well occur just about the time this article is published.

While we have written about many of the problems and frustrations inherent in financing a presidential campaign, the fact of the matter is that with thoughtful planning and diligent efforts by all concerned you can avoid adverse consequences to the operation of the campaign by complying with the FECA.

For us the bottom line is very simple. The time has come for the Congress to take a hard look at the way in which we are regulating presidential campaigns, or one day we may find that these laws have in fact subverted the process.

FOOTNOTES

[1] 2 U.S.C. § 431.
[2] 2 U.S.C. § 432(a).
[3] 26 U.S.C. § 9034.
[4] 2 U.S.C. § 441a(b); 26 U.S.C. § 9035(a).
[5] FEC MUR's 1667, 1704.
[6] *Id.*
[7] 11 C.F.R. § 110.14(d)(2).
[8] AO 1980-5.
[9] MUR 1704.
[10] FEC Agenda Doc. 1986-94.
[11] 2 U.S.C. § 441a(a)(1).
[12] 11 C.F.R. § 103.3(b).
[13] FEC, MANUAL FOR CANDIDATES RECEIVING PRESIDENTIAL PRIMARY MATCHING (1983).
[14] 26 U.S.C. § 9038(b); 11 CFR §§ 9038.2, 9038.3.
[15] Brief for the Federal Election Commission in Mondale for President v. FEC, No. 85-1338 (D.C. Cir.).
[16] 11 C.F.R. § 9038.4(b)(4).
[17] FEC v. Florida for Kennedy Committee, 492 F. Supp. 587 (S.D. Fl. 1979); *rev'd*, 681 F.2d 1281 (11th Cir. 1982), *reh. denied*, No. 80-6013 (11th Cir. Oct. 8, 1982); FEC v. Citizens for Democratic Alternatives in 1980, 655 F.2d 397 (D.C. Cir.) *cert. denied*, 454 U.S. 897 (1981); FEC v. Machinists Non-Partisan League, 655 F.2d 380 (D.C. Cir.), *cert denied*, 454 U.S. 897 (1981).
[18] *Id.*
[19] FEC Legislative Recommendations, FEC Annual Reports, 1980 to 1985.
[20] 2 U.S.C. § 441a(a).
[21] 2 U.S.C. § 441(a)(1)(c).
[22] 26 U.S.C. § 9031; 11 C.F.R. Parts 9031-39.
[23] 26 U.S.C. §§ 9033(b), 9034; 11 C.F.R. § 9033.2.
[24] 2 U.S.C. § 441a(c).
[25] 26 U.S.C. § 9034(a); 11 C.F.R. § 9034.2(c)(4). The starting date of the period is set by statute, the closing date by FEC regulation.
[26] 26 U.S.C. §§ 9032(6), 9033(c); 11 C.F.R. §§ 9032.6, 9037.1.
[27] 11 C.F.R. § 9034.2(a)(4).
[28] 2 U.S.C. § 441a(b).
[29] *Id.*
[30] 2 U.S.C. § 431a (b)(vi).
[31] 2 U.S.C. § 441a(b)(1)(A).
[32] 2 U.S.C. §§ 431 (8)(B)(X), (xii).
[33] *Cf.* 11 C.F.R. §§ 114.9(e), 9034.7(b)(7).
[34] 51 Fed. Reg. 28154, August 5, 1986. These proposed revisions were pending before the FEC at the time of drafting this article.
[35] Proposed § 106.2(a)(1).
[36] Proposed § 9034.4(a)(4).
[37] Under FEC regulations, candidates are no longer "eligible" to receive matching funds: (1) when they became inactive; (2) when they fail to receive at least 10 percent of the votes in two consecutive primiaries; or (3) at the end of the matching payment period (for major party candidates—the date of nomination). 11 C.F.R. §§ 9033.5(a), (b), (c).
[38] Proposed § 9034.4(b)(3).
[39] Proposed § 9035.a(c)(1). This addition to the regulations would essentially ratify the approach used by the auditors in 1980 when the regulations were silent as to treatment of the costs.
[40] 51 Fed. Reg. 28154, August 5, 1986.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] FEC Written Responses to Questions by Congressman Al Swift Concerning Fiscal Year 1987 Budget Request, February 18, 1986.
[46] *Id.*
[47] Agenda Doc. 84-79, adopted at Open Session held on May 24, 1984.

ROBERT J. SAMUELSON

The Campaign Reform Fraud

Money is a necessary evil in politics. Spending limits would create greater evils

The Founding Fathers are growling in their graves. The Senate is now debating campaign-finance "reform": a respectable-sounding idea that's a fraud. Campaign reform would cure problems that don't exist with solutions that would restrict free speech, smother elections in bureaucratic rules and hurt candidates' chances of beating incumbents. It's an odd way to celebrate the Constitution's 200th birthday.

Blame that on Fred Wertheimer of Common Cause. His crusade for reform—campaign-spending restrictions and public financing—is built on half-truths. He says that campaign contributions of "special interests" have corrupted politics. They haven't. The Founding Fathers knew that special interests were inevitable. Their government of checks and balances requires compromise; competing groups check each other. The system isn't perfect, but it curbs the undue influence of campaign contributors.

Wertheimer is a genius at obscuring this. He harps on the huge rise in congressional campaign spending—up from $195 million in 1978 to $450 million in 1986—and its simplest implication: because congressmen need more money, they're more beholden to donors. The obvious answer is to limit dependence on the donors. The logic fits popular prejudices about special interests, and most editorialists and journalists accept Common Cause's claims uncritically. They shouldn't.

For starters, money doesn't determine who wins elections. Winning candidates are often outspent. In last year's Senate election, says political scientist Michael Malbin, six of the seven Democrats who ousted incumbent Republicans were outspent by an average of about 75 percent. There are too many other influences to make money decisive. the economy, party loyalties, personalities, issues, national mood. The 1986 election results, Brooks Jackson of The Wall Street Journal wrote later, suggested "that much . . . money was spent with little practical effect."

Paradoxically, campaign reform could make it tougher for challengers to unseat incumbents. If money doesn't settle elections, serious challengers need adequate minimums to gain name recognition and project campaign themes. It's these threshold amounts that campaign reform threatens. The spending limits in the bill before the Senate are below what five of the winning Senate Democratic challengers spent. In North Carolina, Terry Sanford spent $4.17 million to beat former senator James T. Broyhill. The bill would have allowed Sanford $2.95 million.

No one is smart enough to set "correct" spending limits based on population or anything else. States and congressional districts differ radically in political characteristics. California races require lots of media spending. That's less true in Chicago. Spending in hotly contested races is typically higher than average. Because Congress—that is, incumbents—would control spending limits, the bias would be against challengers.

Likewise, Wertheimer's assertion that campaign contributions corrupt the legislative process is similarly weak. You hear lots of talk about the dangers of political-action committees (PAC's). What you don't hear is:

- PAC's remain a minority of all contributions. In 1986 they were 21 percent for the Senate (up from 17 percent in 1984) and 34 percent for the House (level with 1984).
- The diversity of the 4,157 PAC's dilutes their power. There are business PAC's, labor PAC's, pro-abortion PAC's, anti-abortion PAC's, importer PAC's and protectionist PAC's. Contributions are fairly evenly split between Democrats ($74.6 million in 1986) and Republicans ($57.5 million).
- PAC's give heavily to senior, powerful congressmen, who are politically secure and not easily intimidated. According to Common Cause, Democratic Rep. Augustus Hawkins of California is the most dependent on PAC contributions (92 percent). First elected in 1962, he won last year with 85 percent of the vote.

Of course special interests mob Congress. That's democracy. One person's special interest is another's crusade or livelihood. To be influential, people organize. As government's powers have grown, so has lobbying by affected groups: old people, farmers, doctors, teachers. The list runs on. But PAC's are only a minor influence on voting. Political scientist Frank Sorauf of the University of Minnesota reports that in 1984 the average PAC contribution to House incumbents was less than one-third of 1 percent of the average congressman's total receipts. Congressmen vote according to their political views, constituents' interests, party wishes and—yes—their consciences. Special interests were supposed to block tax reform. They didn't.

Free speech: About half the rise in campaign spending since 1978 reflects inflation. Much of the rest stems from the emergence of younger politicians who use expensive campaign consultants, television and direct mail. In 1984 Democratic House Speaker Thomas P. O'Neill Jr. of Massachusetts spent $213,000 winning re-election. In 1986 Democrat Joseph P. Kennedy II spent $1.8 million to win the same seat. But the expense of modern communications makes it no less vital for free speech.

That's why the Supreme Court held in 1976 that mandatory campaign-spending limits on candidates violate the First Amendment. Public financing of election spending aims to make "voluntary" limits more acceptable. But even if voluntary limits on candidates were enacted, the problem of "independent spending" remains: if I want to buy TV time to support Joe Blow, the Supreme Court says that's my right. Candidate spending limits would prompt special interests to raise independent spending. The Senate bill tries to deter this by subsidizing responses: my $10,000 praising Joe Blow would entitle his opponent to $10,000 of public money to answer me.

Suppose this were judged constitutional (unlikely), what's the point? In our diverse society, one role of politics is to allow the venting of different opinions and pent-up frustrations. Groups need to feel they can express themselves and participate without colliding with obtuse rules intended to shut them out. Our politics is open and freewheeling. Its occasional excesses are preferable to arbitrary restraints. Wertheimer's brand of reform is misconceived. The Senate would dignify the Founding Fathers by rejecting it.

Senator HEFLIN. We are delighted to have Representative Schumer with us and we are glad to hear from you.

STATEMENT OF REPRESENTATIVE CHARLES E. SCHUMER

Mr. SCHUMER. Thank you, Senator, and I have a statement which I would ask be submitted for the record.

I am the sponsor of a similar proposal to Senator Hollings' in the House, and let me say that I think Senator Specter hit the nail on the head; but I would not belittle it the way that my colleague here from Kentucky did. That is, once you cannot limit millionaires, the whole system becomes skewed and whatever system you try to put in place, with or without public finance, just does not work.

Now, I do not agree with Senator McConnell. I think the influence of money in politics is rather pernicious. The idea that you are getting more people into the process, we do not go fund raising knocking on doors and just asking every citizen to contribute to our campaigns. There are only certain people who can contribute. They are much higher than average income. The most of my constituents cannot afford to contribute and they feel that they do not have the same access and right to the political system as others do.

I have a new fellow who is down here working for me, he is a partner in a New York law firm and he has been here 3 months; and I asked him what is the number one thing that impressed you about this place and he said how much money influences the place. We all know that. There are different ways to change it, but I would submit to the panel here that the only way that we can clean up our political system is by a *Buckley* v. *Valeo* type of amendment such as Senator Hollings and I have introduced because otherwise millionaires will be able to run and contribute with impunity themselves. Once you have imposed a limit, I do not think there is a God-given constitutional right for someone to put the same television commercial on about him or herself for the 400th time. That does not increase the constitutional debate. That has nothing to do with what the Founding Fathers thought the first amendment was; and yet if you limit it, you could then either with public finance or without set reasonable limits overall on the system, remove or eliminate the pernicious effects of the money on the system.

Let's make no mistake about it, gentlemen. Until we repeat *Buckley* v. *Valeo* we will not get any kind of campaign finance reform that matters. Eliminating PAC's, I did not share some of the Senator's fervor for that. You eliminate the PAC's and they will just make the contribution by individuals, and they can do that almost as easily as they can by PAC's. That is not going to change the problem. That is not going to resolve it. Until you can limit what an individual can plug into his own campaign, you will not be able to reform our system.

So I would submit to this panel that this kind of amendment is the only way to go and we will be here another 10 years debating about political reform until we get those kind of limits. In the interests of brevity, I would just submit my statement for the record and appreciate the opportunity to testify.

Senator **Heflin**. Your statement will be made a part of the record.

[The prepared statement of Representative Schumer follows:]

Statement of the Honorable Charles E. Schumer
Before the Subcommittee on Constitution
Committee of the Judiciary

In Support of
A Constitutional Amendment to Limit Campaign Spending
March 17, 1988

Mr. Chairman and distinguished members of the Subcommittee, thank you for the opportunity to testify before you today regarding the timely and troublesome issue of campaign finance reform. I would like to commend my friends from South Carolina and California, Senators Hollings and Cranston, for their leadership on this difficult issue.

It was almost one year ago that I, along with my colleagues from the Senate, and my friend Congressman Bruce Vento of Minnesota, introduced a constitutional amendment to limit campaign spending. I note that nearly one year later, despite the spiralling costs of running a campaign, and the increasing public perception that federal offices are for sale, we are no closer to our goal of campaign finance reform. Mr. Chairman, I believe that this hearing will highlight both the pressing need for changes in the manner in which we spend our way into office, and the obstacles that we face in crafting effective reforms to address this need.

Surely, the elections this year, as all the previous elections in the past decade, will prove that "money talks." The candidate who spends the most, can talk the most. Indeed, in 1976, the Supreme Court assured this result in the case of Buckley v. Valeo, by striking down key portions of the 1974 amendments to the Federal Election Campaign Act. In equating spending money with speech, the Court prohibited dollar limits on overall campaign expenditures, limits on how much of a candidate's own money could be spent, and limits on independent expenditures.

As a result of Buckley, more and more campaign funds are being funneled through a gaping loophole in our campaign finance laws. In ten years, while the cost of living nearly doubled, congressional campaign expenditures nearly quadrupled. During the 1979-80 election cycle, $2.3 million was spent on independent expenditures compared to $8.5 million in 1986. In terms of overall campaign spending, a total of $450 million was spent on the House and Senate campaigns, compared with $115.5 million 10 years earlier. $450 million. To give you some perspective on that number, it is the same figure from this year's budget to fund our Census Bureau in a year when it is preparing to conduct the dicennial census; the same figure allocated for housing for the elderly and handicapped nationwide; the same figure used to fund the U.S Attorneys' offices across the country.

Most unfortunately, this proliferation of candidates' "free speech" has been at the expense of the integrity of our election process and the offices we hold. We simply cannot afford, at any price, the public perception that federal offices are bought and sold.

Despite the public sentiment, Congress is severely constrained in remedying campaign spending run amok. Because of the Buckley decision, Congress has been forced into legislative contortions in which we try to compensate for our legislative inability to directly limit campaign spending. Even public financing proposals, which have great merit, have shortcomings.

First, since a candidate always has the option not to take public funds, we will still see candidates amassing enormous war chests with the same perverting effect on the system. As long as millionaires are free to empty their bank accounts in pursuit of Federal office, public financing will not completely solve the problem.

Second, and even more vexing, is the relationship of public financing schemes to primary elections. In many federal elections, winning the primary is tantamount to being elected. As a result, primaries are where the big money is spent. If public money is not provided, Buckley prevents us from imposing serious reforms.

However, if public funds are provided, a host of other problems emerge. If the threshhold for receiving money (by first raising a set amount privately or collecting signatures) is too low there will be so many candidates that the winning candidate may only have secured a very small percentage of the vote. If the threshold is set too high, it either will discourage those without large political or financial bases from running or give groups that can amass many special interest contributions an inordinate advantage. No system has yet found the proper balance, which may well be impossible to achieve.

Thus, public financing, whatever its advantages over the current system, can hardly cure the ills of the current system. Only a constitutional amendment overturning Buckley v. Valeo will allow Congress to address the problem of campaign "overfinancing" directly and thoroughly. The simple, one line amendment that I introduced in Congress last year permits Congress to regulate overall campaign spending. While the ACLU has expressed reservations about limiting the scope of the First Amendment, the amendment that I offered, H.J. Res. 306, has been carefully drafted to address their concerns about overbreadth and overreaching by the Congress in this area. In light of the careful balance that has been struck, I believe that this would be the single, and most effective reform that Congress could enact to curtail the skyrocketing price of running for office.

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Senator **Heflin**. I see Senator Roth is coming in. We have an unwritten rule that Senators have the right to speak first because they have to be in various places and time is of the essence, so, Senator Roth, we are delighted to have you. These lights are here for a purpose.

STATEMENT OF SENATOR WILLIAM V. ROTH

Senator **Roth**. Thank you, Mr. Chairman. I would like to express my appreciation for you holding this hearing on what I consider to be the very serious problem of campaign finance reform. I think in view of the recent impasse over S. 2 that your hearing is very timely.

Congress has already expressed itself on the subject of campaign finance reform. It said there should be limits on all contributions and on candidate expenditures. There should be limits on independent expenditures. There should be limits on how much personal wealth a candidate can spend on his campaign. There should be disclosure. Congress has already taken that position in 1974. That was the congressional ideal.

However, as we all know, the Supreme Court stepped in and decimated the remedy enacted by Congress when it handed down its decision in *Buckley* v. *Valeo.*

While the Court upheld limits on campaign contributions, it struck down the limits on independent expenditures and the use of personal wealth. The effect of that decision was to exacerbate the difference between the wealthy and not so wealthy that Congress wished to eliminate.

Also the decision created the opportunity for the growth of independent expenditures with its attendant negative advertising. Unless we act, the problem of independent expenditures will fester and grow.

Legislative solutions will not suffice. The present system makes it relatively difficult for a candidate of average means, who has to run a campaign on statutorily limited contributions, to compete with a wealthy candidate who need not rely on contributions at all.

The much-debated S. 2 would try to help by asking candidates to abide by voluntary limits. I doubt if it could work in practice; but even if it could achieve its goals, its overall breadth is too narrow. It cannot limit, for example, independent expenditures. What S. 2 does in the name of decreasing overall spending is to provide additional spending, financed by the taxpayer, for candidates adversely impacted by independent expenditures. This is another illustration of how S. 2 does not work and why a constitutional amendment is necessary.

I have read that a supporter of one of the Presidential candidates independently put together his own ad in Boston for broadcast into New Hampshire during the primary. Let us suppose the ad said, "Vote for Mr. X. He alone has the courage to raise your taxes." The ad may have been sincere. Many believe, maybe along with Governor Babbitt, that raising taxes is desirable. However, Mr. X may not think it was politically smart to make that pitch at the 11th hour in a State like New Hampshire. So in this case who does the FEC write the checks to? To Mr. X, because he was politically hurt by the substance of the ad or to A, B, and C because the independent spender wanted to help Mr. X?

Once these questions are answered, observers may wonder what benefits the check provides when received after the damage is done and after the election is over.

In my opinion there is no adequate statutory solution possible for the problem of independent expenditures. If that is so, it is a waste of government resources to try to address just part of the problem legislatively. It is like building a dam across half the river.

More important, in my mind, inaugurating a program of public finance for congressional candidates, the central feature you have in S. 2, is totally inappropriate in our present budget crunch. I do not believe that the people want public financing. In my state they responded to my questionnaire by opposing public financing 69 percent to 29. Even if you like public financing, you have to admit, I think, that legislative solutions like S. 2 must be incomplete because of the holdings of *Buckley* v. *Valeo.*

In sounding out my constituents on the subject of campaign reform, I believe they want three reforms. First, they want reasonable limitations on campaign expenditures, but they do not want public financing. Second, they want reasonable limits placed on the role of PAC's, both with respect to contributions to candidates as well as their independent expenditures. Third, they want shorter campaigns.

Each constituent request is thwarted by *Buckley* v. *Valeo.* Each requires a constitutional amendment such as S.J. Res. 130, which I have proposed.

Since the ratification of the Constitution and the Bill of Rights, we have regularly adopted constitutional amendments to overturn Supreme Court decisions thought to be bad public policy. I will not review them orally, but ask my full statement be included as part of the record.

Of course, not every issue is of the caliber to merit a constitutional amendment, but campaign financing, I submit, meets that test. It is not ephemeral. It is important. It is a matter of electoral integrity—the manner in which we are elected. It is a problem, at least in the Senate, left us by a constitutional amendment, the 17th, which provided for the popular election of Senators. If a constitutional amendment on campaign financing were submitted and ratified, it would blend in with the many provisions that deal with the electoral process.

Some might object to my proposed amendment because it affects first amendment rights, but in my mind campaign financing is not pure speech. It is a mixture of speech and commerce. And have we ever regulated commerce!

I am disappointed the Supreme Court did not recognize the mixed nature of campaign financing and allow reasonable limitations to be imposed because of the "commercial" aspects of the campaign financing.

My proposal differs from some of the others offered. Please note that Senate Joint Resolution 130 would provide the same authority over State offices that it provides Congress over Federal offices. This not only affords symmetry but provides an incentive for ratification, a feature I strongly commend to this subcommittee's attention.

Also, my proposal allows only "reasonable" limitations to be imposed. Other proposals in my opinion would place congressionally enacted limitations beyond judicial review. My proposal would not. The purpose of my formulation is to allow the courts to make sure that limitations are not set so low by incumbents that challengers cannot make their case to the electorate. I do not think it is wise to have incumbents make this judgment insulated from the prospect of judicial review.

Finally, my proposal does not deal with contributions as such. My thinking was that since the Supreme Court upheld congressional authority in this area, it was unnecessary to amend the Constitution to grant such authority again. For these reasons, Mr. Chairman, I commend the form of Senate Joint Resolution 130 to your attention.

In summary, there is a problem. It cannot be adequately addressed by statute. Senate Joint Resolution 130 is an appropriate and necessary solution, and I would urge its prompt consideration.

Senator HEFLIN. Thank you, Senator Roth.

Senator Specter, do you have a question?

Senator SPECTER. One or two, Mr. Chairman.

Senator Roth, when you put in the provisions as to reasonable limitations, do you not really open the door for judicial interpretation as to what is reasonable that may leave us with some substantial problems, perhaps even similar to the problems we have now?

Senator ROTH. I suppose, Senator Specter, you could argue any area over which there can be review by the Supreme Court raises that difficulty. But it does seem to me that as part of our democratic system, it is important that the public have confidence in the electoral process. And, of course, Congress would never do what I suggested earlier. But if regulations were adopted that, let's say, unfairly or unwisely assisted incumbents, as I alluded to, I think that would bring doubt on the part of the public in the electoral process. So we have thought that there was good reason to permit the courts to have some judicial review.

Senator SPECTER. Well, that is a complex subject, but I will not pursue it further. It seems to me what Congress is going to do is, well, as you know, it is not likely to be unreasonable or if it denies equal protection there may be other problems.

I want to ask you one other point because we have gone for a period of time. That is, with respect to your proposed resolution, it differs from Senator Hollings'. Where he talks about contributions and expenditures yours talks about only expenditures. Do you believe that there is any doubt about congressional authority to limit the total amount that can be expended by candidates once you eliminate the independent contribution or the ability of the person to spend as much of his or her own money and he or she may choose?

Senator ROTH. I think that is so, Senator Specter. There is a problem as to our ability to place an overall limitation on campaign expenditures. Yes, sir.

Senator SPECTER. Thank you very much, Senator Roth.

Senator ROTH. Thank you.

[The prepared statement of Senator Roth follows:]

PREPARED STATEMENT OF SENATOR WILLIAM V. ROTH, JR.

Mr. Chairman, I would like to thank you for holding this hearing on the very serious problem of campaign finance reform. In view of the recent impasse over S. 2, this hearing is most timely.

Congress has already expressed itself on the subject of campaign finance reform. It said that there should be limits on all contributions and on candidate expenditures. There should be limits on independent expenditures. There should be limits on how much personal wealth a candidate can spend on his campaign. And there should be disclosure. Congress has already taken that position. In 1974. That was the congressional ideal.

However, as we all know, the supreme court stepped in and decimated the remedy enacted by Congress when it handed down its decision in *Buckley* v. *Valeo.*

While the court upheld limits on campaign contributions, it struck down the limits on independent expenditures and on the use of personal wealth. The effect of the decision was to exacerbate the difference between the wealthy and not-so-wealthy that Congress wished to eliminate. Also the decision created the opportunity for the growth of independent expenditures with its attendant expenditures will fester and grow.

Legislative solutions will not suffice. The present system makes it relatively difficult for a candidate of average means, who has to run a campaign on statutorily limited contributions, to compete with a wealthy candidate, who need not rely on contributions at all.

The much-debated S. 2 would try to help by asking candidates to abide by voluntary limits. I doubt that S. 2 could work in practice, but even if S. 2 could work and achieve its goals, its overall breadth is too narrow. It cannot limit, for example, independent expenditures. What S. 2 does in the name of decreasing overall spending is to provide additional spending, financed by the taxpayer, for candidates adversely impacted by independent expenditures. This is another illustration of how S. 2 doesn't work and why a constitutional amendment is needed. I have read that a supporter of one of the presidential candidates independently put together his own ad in Boston for broadcast into New Hampshire during the primary.

Now, let us suppose the ad had said: "Vote for Mr. X. He alone has the courage to raise your taxes." The ad may have been sincere. Many believe along with Governor Babbitt that raising taxes is desirable. However, Mr. X may not think it was politically smart to make that pitch at the eleventh hour in a state like New Hampshire.

So in this case who does the FEC write the checks to? To Mr. X, because he was politically hurt by the substance of the ad? Or to A, B, and C, because the independent spender wanted to help Mr. X? Once those questions are answered, observers may wonder what benefit the check provides when received after the damage is done and after the election is over.

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Most important, in my mind, inauguration a program of public financing for congressional candidates, the central feature of S. 2, is totally inappropriate in our present budget crunch. I do not believe that the people want public financing. In my state, those responding to my questionnaire opposed public financing 69% to 29%. And even if you like public financing, you have to admit, I think, that legislative solutions like S. 2 must be incomplete because of the holding of *Buckley* v. *Valeo.*

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Each constitutent request is thwarted by *Buckley* v. *Valeo.* Each requires a constitutional amendment such as S.J. Res. 130, which I have proposed.

Since the ratification of the constitution and the bill or rights, we have regularly had to adopt constitutional amendments to overturn supreme court decisions thought to be bad public policy.

The eleventh amendment preserving state immunity was adopted to overturn *Chisholm* v. *Georgia,* 2 Dall. 419(1793). The thirteenth, fourteenth, and fifteenth amendment—the civil war amendments—overturned the infamous decision in *Dred*

Scott v. *Sandford,* 19 How. 393(1857). The sixteenth amendment, providing for the federal income tax, overturned *Pollock* v. *Farmers Loan and Trust Company,* 157 U.S. 429, 158 U.S. 601(1895). The nineteenth amendment, providing women's suffrage, overturned *Minor* v. *Happersett* 21 Wall 162(1875). The twenty-fourth amendment, prohibiting the poll tax, overturned *Breedlove* v. *Suttles,* 302 U.S. 277(1937). And the twenty-sixth amendment, reducing voting age qualifications, overturned *Oregon* v. *Mitchell,* 400 U.S. 112(1970).

I recount this history for the subcommittee to underscore that eight of the sixteen amendments ratified since the bil! or rights were in response to supreme court decisions thought to be bad policy. Of course, not every issue is of the Calibre to merit a constitutional amendment. But campaign financing, I submit, meets the calibre test. It is not ephemeral. It is important. It is a matter of electoral integrity—the manner in which we are elected. It is a problem—at least in the Senate—left us by a constitutional amendment, the Seventeenth, which provided for the popular election of Senators. If a constitutional amendment on campaign financing were submitted and ratified, it would blend in with the many provisions that deal with the electoral process.

Some might object to my proposed amendment because it affects first amendment rights. But in my mind, campaign financing is not pure speech. It is a mixture of speech and commerce. And have we ever regulated commerce! I am disappointed that the supreme court did not recognize the mixed nature of campaign financing and allow reasonable limitations to be imposed because of the "commercial" aspects of campaign financing.

My proposal (S.J. Res. 130) differs from some others offered. Please note that S.J. Res. 130 would provide the states the same authority over state offices that it provides the Congress over Federal offices. This not only affords legal symmetry but provides an incentive for ratification—a feature I strongly commend to this subcommittee's attention.

Also, my proposal allows only "reasonable" limitations to be imposed. Other proposals, in my opinion, would place congressionally enacted limitations beyond judicial review. My proposal would not. The purpose of my formulation is to allow the courts to make sure that limitations are not set so low by incumbents that challengers cannot make their case to the electorate. I do not think it wise to have incumbents make this judgment insulated from the prospect of judicial review.

Finally, my proposal does not deal with contributions as such. My thinking was that since the supreme court unheld congressional authority in this area, it was unnecessary to amend the constitution to grant such authority. For these reasons, I commend the form of S.J. Res. 130 to your attention.

In summary, Mr. Chairman, there is a problem. It cannot be adequately addressed by statute. S.J. Res. 130 is both a necessary and appropriate solution. I urge its prompt consideration.

Senator **Heflin**. Lloyd Cutler, will you come forward. We are delighted to have you and you may give your testimony. We have a panel. We have got Prof. Walter Dellinger and Prof. Joel Gora here too. We are delighted to have you appear. Mr. Cutler, if you will begin.

STATEMENT OF A PANEL CONSISTING OF LLOYD N. CUTLER, ESQ., WILMER, CUTLER & PICKERING; WALTER DELLINGER, PROFESSOR, DUKE UNIVERSITY LAW SCHOOL; JOEL GORA, PROFESSOR, BROOKLYN LAW SCHOOL, ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION

STATEMENT OF LLOYD N. CUTLER

Mr. **Cutler**. Thank you, Mr. Chairman.

Along with Senator Kassebaum and Mr. Douglas Dillon, I am a cochairman of the Committee on the Constitutional System which is a group of several hundred present and former legislators, including, in addition to Senator Kassebaum, Senator Moynihan and former Senators Brady, Mathias, and Fulbright, executive branch officials, political party officials, professors and civic leaders who are interested in analyzing and correcting what we perceive as some of the weaknesses in the political structure.

There seems to be so much consensus in this group that unlimited expenditures are a glaring weakness of the system that I will not dwell on that. Our reasons are set forth in the statement. I would like to deal with Senator McConnell's point that the more money that is spent, the greater the voter turnout. I think that is quite wrong and I would point you to the 1986 congressional election in which $450 million was spent, which was very considerably more than in the 1982 off year election, and yet we had a voter turnout of 35 percent. So that it was theoretically possible on average for 18 percent of the voters in any congressional district or State to elect a Congressman or a Senator.

Senator McConnell, it was also true that in the 1986 election, the 50-odd members of the two tax writing committees, when the 1986 Tax Act was going through, received contributions of something in the order of $50 million from PAC's which had a direct and immediate interest in provisions of that bill. Just imagine what that does to public cynicism and public frustration about how the process really works.

Senator McConnell also made the point that he would get rid of PAC's, but that you do not need a constitutional amendment to do so. I think it is plain, Senator Specter, it is not possible to get rid of PAC's without a constitutional amendment. We might cut off the financial support that corporations and unions give to the organization of PAC's, but a PAC is a political committee and the right to form a committee is clearly protected, I think, by the first amendment, particularly in the so-called independent committee which most PAC's, of course, could claim they really are.

So the only way, so long as Congress remains deadlocked on public financing of congressional elections, the only way that it is going to be possible to set limits on total expenditures in congressional elections and on independent expenditures in Presidential elections, because as you know the public financing provisions do contain expenditure limits which the Supreme Court has sustained, the only way we are going to be able to grapple with this problem of unlimited expenditures is by way of a constitutional amendment.

I think it is also so that it is not possible—you raised the question of whether *Buckley* will prevent the Congress from setting a limit on a candidate's expenditures other than independent ones and the millionaires expenditures. The answer is *Buckley* very clearly does do that. You could not fix a limit on the total number of $1,000 contributions that can be raised and spent. *Buckley* is explicit on that, and I took part in the argument of the case.

The only way to go, therefore, is by way of a constitutional amendment. You raised the $64,000 question, Senator Specter. Is it unwise to do something that in effect corrects a Supreme Court reading of the first amendment? There are other proposals to amend the first amendment kicking around, most notably the school prayer proposal which is a first amendment proposal. There is always the danger that bells and whistles would be added to an amendment to try to deal solely with expenditure limits on contributions to campaigns, but I think Congress clearly has the good sense not to go forward with the kind of amendment that went that far, adding those bells and whistles; and if it did, I do not believe you would ever get three-quarters of the States to ratify.

So I do not think that is much of a danger. It is certainly something to think about, but I would remind you that on three previous occasions in our history, we, the people, amended the Constitution to correct a weakness which we perceived in that rightly revered document as interpreted by the Supreme Court. On two of those occasions, on the *Dred Scott* decision and the decision saying that income taxes were unconstitutional, I think history has very clearly shown that the amendments turned out to be essential in order to keep us being a just and healthy and powerful society.

In my view and in the view of our committee, we now face another situation like this. As to unlimited campaign expenditures, just to paraphrase Lord Acton for a moment about power, you might say that all political expenditures corrupt and absolutely unlimited political expenditures corrupt absolutely.

This trend toward absolutely unlimited money is going to grow and grow and grow. The political diseases that it is causing are going to grow even more rapidly than, say, new cases of AIDS. The problem is not going to be to get this amendment ratified if you can get it through the Congress. The problem is going to be to get it through the Congress and the time to start in our submission is now.

[The prepared statement of Lloyd Cutler follows:]

STATEMENT OF LLOYD N. CUTLER

My name is Lloyd N. Cutler. Along with Senator Nancy Kassebaum of Kansas and Mr. Douglas Dillon, I am a Co-Chairman of the Committee on the Constitutional System, a group of several hundred present and former legislators, executive branch officials, political party officials, professors and civic leaders who are interested in analyzing and correcting some of the weaknesses that have developed in our political system.

One of the most glaring weaknesses, of course, is the rapidly escalating cost of political campaigns, and the growing dependence of incumbents and candidates on money from interest groups who expect the recipient to vote in favor of their particular interests. Incumbents and candidates must devote large portions of their time to begging for money; they are often tempted to vote the conflicting interests of their contributors and to create a hodgepodge of conflicting and indefensible policies; and in turn public frustration with these policies creates cynicism and contempt for the entire political process.

A serious attempt to deal with the campaign financing problem was made in the Federal Election Campaign Act of 1974 and the 1976 amendments, which set maximum limits on the amounts of individual contributions and on the aggregate expenditures of candidates and so-called independent committees supporting such candidates. The constitutionality of these provisions was challenged in the famous case of Buckley v. Valeo, 424 U.S. 1, in which I had the honor of sharing the argument in support of the statute with Professor Archibald Cox. While the Supreme Court sustained the constitutionality of the limits on contributions, it struck down the provision limiting expenditures for candidates and independent committees supporting such candidates. It found an inseparable connection between an expenditure limit and the extent of a candidate's or committee's political speech, which did not exist in the case of a limit on the size of each contribution by a non-speaker unaccompanied by any limit on the aggregate amount a candidate could raise. It also found little if any proven connection between corruption and the size of a candidate's aggregate expenditures, as distinguished from the size of individual contributions to a candidate.

The Court did, however, approve the Presidential Campaign Financing Fund created by the 1976 amendments, including the condition it imposed barring any presidential nominee who accepted the public funds from spending more than a specified limit. However, it remains unconstitutional for Congress to place any limits on expenditures by independent committees on behalf of a candidate. In recent presidential elections these independent expenditures on behalf of one candidate exceeded the amount of federal funding he accepted. Moreover, so long as the Congress remains deadlocked on proposed legislation for the public financing of Congressional campaigns, it is not possible to use the public financing device as a means of limiting Congressional campaign expenditures.

Accordingly, the Committee on the Constitutional System has come to the conclusion that the only effective way to limit the explosive growth of campaign financing is to adopt a constitutional amendment. The amendment would be a very simple one consisting of only 46 words. It would state merely that "Congress shall have power to set reasonable limits on campaign expenditures by or in support of any candidate in a primary or general election for federal office. The States shall have the same power with respect to campaign expenditures in elections for state and local offices".

Our proposed amendment would enable Congress to set limits not only on direct expenditures by candidates and their own committees, but also on expenditures by so-called independent committees in support of such a candidate. The details of the actual limits would be contained in future legislation and could be changed from time to time as Congress in its judgment sees fit.

It may of course be argued that the proposed amendment, by authorizing reasonable limits on expenditures, would necessarily set limits on the quantity of speech on behalf of a candidate and that any limits, no matter how ample, is undesirable. But in our view the evidence is overwhelming by now that unlimited campaign expenditures will eventually grow to the point where they consume so much of our political energies and so fracture our political consensus that they will make the political process incapable of governing effectively. Even the Congress has found that unlimited speech can destroy the power to govern; that is why the House of Representatives has imposed time limits on Members' speeches for decades and why the Senate has adopted a rule permitting 60 senators to end a filibuster. One might fairly paraphrase Lord Acton's famous aphorism about power by saying, "All political money corrupts; unlimited political money corrupts absolutely."

Finally, Mr. Chairman, I would not be discouraged from taking the amendment route by any feeling that constitutional amendments take too long to get ratified. The fact is that the great majority of amendments submitted by Congress to the states during the last 50 years have been ratified within twenty months after they were submitted. All polls show that the public strongly supports limits on campaign expenditures. The principal delay will be in getting the amendment through Congress. Since that is going to be a difficult task, we ought to start immediately. Unlimited campaign expenditures and the political diseases they cause are going to increase at least as rapidly as new cases of AIDS, and it is high time to start getting serious about the problem.

Mr. Chairman, on three past occasions we the people have amended the Constitution to correct weaknesses in that rightly revered document as interpreted by the Supreme Court. On at least two of those occasions -- the Dred Scott decision and the decision striking down federal income taxes, history has subsequently confirmed that the amendments were essential to our development as a healthy, just and powerful society. A third such challenge is now before us. The time has come to meet it.

For a fuller discussion of the case for a constitutional amendment, I am attaching an article written shortly before his death by Congressman Jonathan Bingham, my college and law school classmate and, in my view, one of the finest public servants of our times.

ANNALS, *AAPSS*, **486**, July 1986

Democracy or Plutocracy? The Case for a Constitutional Amendment to Overturn *Buckley* v. *Valeo*

By JONATHAN BINGHAM

ABSTRACT: In the early 1970s the U.S. Congress made a serious effort to stop the abuses of campaign financing by setting limits on contributions and also on campaign spending. In the 1976 case of *Buckley* v. *Valeo*, the Supreme Court upheld the regulation of contributions, but invalidated the regulation of campaign spending as a violation of the First Amendment. Since then, lavish campaigns, with their attendant evils, have become an ever more serious problem. Multimillion-dollar campaigns for the Senate, and even for the House of Representatives, have become commonplace. Various statutory solutions to the problem have been proposed, but these will not be adequate unless the Congress—and the states—are permitted to stop the escalation by setting limits. What is needed is a constitutional amendment to reverse the *Buckley* holding, as proposed by several members of Congress. This would not mean a weakening of the Bill of Rights, since the *Buckley* ruling was a distortion of the First Amendment. Within reasonable financial limits there is ample opportunity for that "uninhibited, robust and wide-open" debate of the issues that the Supreme Court correctly wants to protect.

Jonathan Bingham was a Democratic representative from New York from 1965 to 1983, when he retired. Before that, he served as one of Adlai Stevenson's deputies in the United States Mission to the United Nations and as secretary to the governor of the state of New York under Averell Harriman. He is a lawyer and is currently a lecturer in law at the Columbia Law School.

"THE First Amendment is not a vehicle for turning this country into a plutocracy," says Joseph L. Rauh, the distinguished civil rights lawyer, deploring the ruling in *Buckley* v. *Valeo*.[1] It is the thesis of this article that the Supreme Court in *Buckley* was wrong in nullifying certain congressional efforts to limit campaign spending and that the decision must not be allowed to stand. While statutory remedies may mitigate the evil of excessive money in politics and are worth pursuing, they will not stop the feverish escalation of campaign spending. They will also have no effect whatever on the spreading phenomenon of very wealthy people's spending millions of dollars of their own money to get elected to Congress and to state office.

When the Supreme Court held a national income tax unconstitutional, the Sixteenth Amendment reversed that decision. *Buckley* should be treated the same way.

BACKGROUND

The Federal Election Campaign Act of 1971 was the first comprehensive effort by the U.S. Congress to regulate the financing of federal election campaigns. In 1974, following the scandals of the Watergate era, the Congress greatly strengthened the 1971 act. As amended, the new law combined far-reaching requirements for disclosure with restrictions on the amount of contributions, expenditures from a candidate's personal funds, total campaign expenditures, and independent expenditures on behalf of identified candidates.

The report of the House Administration Committee recommending the 1974 legislation to the House explained the underlying philosophy:

> The unchecked rise in campaign expenditures, coupled with the absence of limitations on contributions and expenditures, has increased the dependence of candidates on special interest groups and large contributors. Under the present law the impression persists that a candidate can buy an election by simply spending large sums in a campaign. . . .
>
> Such a system is not only unfair to candidates in general, but even more so to the electorate. The electorate is entitled to base its judgment on a straightforward presentation of a candidate's qualifications for public office and his programs for the Nation rather than on a sophisticated advertising program which is encouraged by the infusion of vast amounts of money.
>
> The Committee on House Administration is of the opinion that there is a definite need for effective and comprehensive legislation in this area to restore and strengthen public confidence in the integrity of the political process.[2]

The 1974 act included a provision, added pursuant to an amendment offered by then Senator James Buckley, for expedited review of the law's constitutionality. In January 1976 the Supreme Court invalidated those portions that imposed limits on campaign spending as violative of the First Amendment's guarantee of free speech.

In his powerful dissent, Justice White said, "Without limits on total expenditures, campaign costs will inevitably and endlessly escalate."[3] His prediction was promptly borne out. Multimillion-dollar campaigns for the Senate have become the rule, with the 1984 Helms-Hunt race in North Carolina setting astonishing new records. It is no longer unusual for expenditures in contested House campaigns to go over the million-dollar mark; in 1982 one House candidate reportedly spent over $2 million of his own funds.

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[1] Personal communication with Joseph L. Rauh, Mar. 1985; *Buckley* v. *Valeo*, 424 U.S. 1 (1976).

[2] U.S., Congress, House, Committee on House Administration, *Federal Election Campaign Act, Amendments of 1974: Report to Accompany H. R. 16090*, 93rd Cong., 2d sess., 1974, H. Rept. 93-1239, pp. 3-4.

In 1982 a number of representatives came to the conclusion that the *Buckley* ruling should not be allowed to stand and that a constitutional amendment was imperative. In June Congressman Henry Reuss of Wisconsin introduced a resolution calling for an amendment to give Congress the authority to regulate campaign spending in federal elections. In December, with the cosponsorship of Mr. Reuss and 11 others,[4] I introduced a broader resolution authorizing the states, as well as the Congress, to impose limits on campaign spending. The text of the proposed amendment was:

> Section 1. The Congress may enact laws regulating the amounts of contributions and expenditures intended to affect elections to federal office.
>
> Section 2. The several states may enact laws regulating the amounts of contributions and expenditures intended to affect elections to state and local offices.[5]

In the Ninety-eighth Congress, the same resolution was reintroduced by Mr. Vento and Mr. Donnelly and by Mr. Brown, Democrat of California, and Mr. Rinaldo, Republican of New Jersey. A similar resolution was introduced in the Senate by Senator Stevens, Republican of Alaska. As of the present writing, the resolution has been reintroduced in the Ninety-ninth Congress by Mr. Vento.[6]

No hearings have been held on these proposals, and they have attracted little attention. Even organizations and commentators deeply concerned with the problem of money in politics and runaway campaign spending have focused exclusively on statutory remedies. Common Cause, in spite of my pleading, has declined to add a proposal for a constitutional amendment to its agenda for campaign reform or even to hear arguments in support of the proposal. A constituency for the idea has yet to be developed.

THE NATURE OF THE PROBLEM

This article proceeds on the assumption that escalating campaign costs pose a serious threat to the quality of government in this country. There are those who argue the contrary, but their view of the nature of the problem is narrow. They focus on the facts that the amounts of money involved are not large relative to the gross national product and that the number of votes on Capitol Hill that can be shown to have been affected by campaign contributions is not overwhelming.

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[3] 424 U.S., p. 264.

[4] The other representatives were Mrs. Fenwick, Republican of New Jersey; Ms. Mikulski, Democrat of Maryland; and Messrs. Bevill, Democrat of Alabama; Donnelly, Democrat of Massachusetts; D'Amours, Democrat of New Hampshire; Edgar, Democrat of Pennsylvania; LaFalce, Democrat of New York; and Wolpe, Democrat of Michigan.

[5] U.S., Congress, House, *Proposing an Amendment to the Constitution of the United States Relative to Contributions and Expenditures Intended to Affect Congressional, Presidential and State Elections*, 97th Cong., 2d sess., 1982, H. J. Res. 628, p. 2.

[6] Ibid., 99th Cong., 1st sess., 1985, H. J. Res. 88.

The curse of money in politics, however, is by no means limited to the influencing of votes. There are at least two other problems that are, if anything, even more serious. One is the eroding of the present nonsystem on the public's confidence in our form of democracy. If public office and votes on issues are perceived to be for sale, the harm is done, whether or not the facts justify that conclusion. In *Buckley* the Supreme Court itself, in sustaining the limitations on the size of political contributions, stressed the importance of avoiding "the appearance of improper influence" as " 'critical . . . if confidence in the system of representative government is not to be eroded to a disastrous extent.' "[7] What the Supreme Court failed to recognize was that "'confidence in the system of representative government' " could likewise be " 'eroded to a disastrous extent' " by the spectacle of lavish spending, whether the source of the funds is the candidate's own wealth or the result of high-pressure fund-raising from contributors with an ax to grind.

The other problem is that excellent people are discouraged from running for office, or, once in, are unwilling to continue wrestling with the unpleasant and degrading task of raising huge sums of money year after year. There is no doubt that every two years valuable members of Congress decide to retire because they are fed up with having constantly to beg. For example, former Congressmen Charles Vanik of Ohio and Richard Ottinger of New York, both outstanding legislators, were clearly influenced by such considerations when they decided to retire, Vanik in 1980 and Ottinger in 1984. Vanik said, among other things, "I feel every contribution carries some sort of lien which is an encumbrance on the legislative process . . . I'm terribly upset by the huge amounts that candidates have to raise."[8] Probably an even greater number of men and women who would make stellar legislators are discouraged from competing because they cannot face the prospect of constant fund-raising or because they see a wealthy person, who can pay for a lavish campaign, already in the race.

In "Politics and Money," Elizabeth Drew has well described the poisonous effect of escalating campaign costs on our political system:

> Until the problem of money is dealt with, it is unrealistic to expect the political process to improve in any other respect. It is not relevant whether every candidate who spends more than his opponent wins—though in races that are otherwise close, this tends to be the case. What matters is what the chasing of money does to the candidates, and to the victors' subsequent behavior. The candidates' desperation for money and the interests' desire to affect public policy provide a mutual opportunity. The issue is not how much is spent on elections but the way the money is obtained. The point is what *raising* money, not simply spending it, does to the political process. It is not just that the legislative product is bent or stymied. It is not just that well-armed interests have a head start over the rest of the citizenry—or that often it is not even a contest. . . . It is not even relevant which interest happens to be winning. What is relevant is what the whole thing is doing to the democratic process. What is at stake is the idea of representative government, the soul of this country.[9]

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[7] 424 U.S., p. 27, quoting *CSC* v. *Letter Carriers*, 413 U.S. 548, 565 (1973); see also 424 U.S., p. 30.

[8] Quoted by Congressman Henry Reuss, in U.S., Congress, House, *Congressional Record*, daily ed., 97th Cong., 2d sess., 1982, 128(81):H3900.

[9] *New Yorker*, 6 Dec. 1982, pp. 55-56.

Focusing on the different phenomenon of wealthy candidates' being able to finance their own, often successful, campaigns, the late columnist Joseph Kraft commented that "affinity between personal riches and public office challenges a fundamental principle of American life."[10]

SHORTCOMINGS OF STATUTORY PROPOSALS

In spite of the wide agreement on the seriousness of the problems, there is no agreement on the solution. Many different proposals have been made by legislators, academicians, commentators, and public interest organizations, notably Common Cause.

One of the most frequently discussed is to follow for congressional elections the pattern adopted for presidential campaigns: a system of public funding, coupled with limits on spending.[11] Starting in 1955, bills along these lines have been introduced on Capitol Hill, but none has been adopted. Understandably, such proposals are not popular with incumbents, most of whom believe that challengers would gain more from public financing than they would.

Even assuming that the political obstacles could be overcome and that some sort of public financing for congressional candidates might be adopted, this financing would suffer from serious weaknesses. No system of public financing could solve the problem of the very wealthy candidate. Since such candidates do not need public funding, they would not subject themselves to the spending limits. The same difficulty would arise when aggressive candidates, believing they could raise more from private sources, rejected the government funds. This result is to be expected if the level of public funding is set too low, that is, at a level that the constant escalation of campaign costs is in the process of outrunning. According to Congressman Bruce Vento, an author of the proposed constitutional amendment to overturn *Buckley*, this has tended to happen in Minnesota, where very low levels of public funding are provided to candidates for state office.

To ameliorate these difficulties, some proponents of public financing suggest that the spending limits that a candidate who takes government funding must accept should be waived for that candidate to the extent an opponent reports expenses in excess of those limits. Unfortunately, in such a case one of the main purposes of public funding would be frustrated and the escalation of campaign spending would continue. The candidate who is not wealthy is left with the fearsome task of quickly having to raise additional hundreds of thousands, or even millions, of dollars.

Another suggested approach would be to require television stations, as a condition of their licenses, to provide free air time to congressional candidates in segments of not less than, for instance, five minutes. A candidate's acceptance of such time would commit the candidate to the acceptance of spending limits. While such a scheme would be impractical for primary contests—which in many areas are the crucial ones—the idea is attractive for general election campaigns in mixed urban-rural states and districts. It would be unworkable, however, in the big metropolitan areas, where the main stations reach into scores of congressional districts and, in some cases, into several states. Not only would broadcasters resist the idea, but the television-viewing public would be furious at being virtually compelled during pre-election weeks to watch a series of talking-head shows featuring all the area's campaigning senators and representatives and their challengers. The offer of such unpopular television time would hardly tempt serious candidates to accept limits on their spending.

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[10] *Washington Post*, 2 Nov. 1982.

[11] In the *Buckley* case the Supreme Court simply assumed that limits on spending were not a violation of free speech when acceptance of such limits was made the condition for receiving public funds. 424 U.S., pp. 85-110. See also Charles McC. Mathias, Jr., "Should There Be Public Financing of Congressional Campaigns?" this issue of *The Annals* of the American Academy of Political and Social Science.

Proponents of free television time, recognizing the limited usefulness of the idea in metropolitan areas, have suggested that candidates could be provided with free mailings instead. While mailings can be pinpointed and are an essential part of urban campaigning, they account for only a fraction of campaign costs, even where television is not widely used; accordingly, the prospect of free mailings would not be likely to win the acceptance of unwelcome campaign limits on total expenses.[12]

Yet another method of persuading candidates to accept spending limits would be to allow 100 percent tax credits for contributions of up to, say, $100 made to authorized campaigns, that is, those campaigns where the candidate has agreed to abide by certain regulations, including limits on total spending.[13] It is difficult to predict how effective such a system would be, and a pilot project to find out would not be feasible, since the tax laws cannot be changed for just one area. For candidates who raise most of their funds from contributors in the $50-to-$100 range, the incentive to accept spending limits would be strong, but for those—and they are many—who rely principally on contributors in the $500-to-$1000 range, the incentive would be much weaker. This problem could be partially solved by allowing tax credits for contributions of up to $100 and tax deductions for contributions in excess of $100 up to the permitted limit. Such proposals, of course, amount to a form of public financing and hence would encounter formidable political obstacles, especially at a time when budgetary restraint and tax simplification are considered of top priority.

Some of the most vocal critics of the present anarchy in campaign financing focus their wrath and legislative efforts on the political action committees (PACs) spawned in great numbers under the Federal Election Campaign Act of 1974. Although many PACs are truly serving the public interest, others have made it easier for special interests, especially professional and trade associations, to funnel funds into the campaign treasuries of legislators or challengers who will predictably vote for those interests. Restrictions, such as limiting the total amount legislative candidates could accept from PACs, would be salutary[14] but no legislation aimed primarily at the PAC phenomenon—not even legislation to eliminate PACs altogether—would solve the problem so well summarized by Elizabeth Drew. The special interests and favor-seeking individual givers would find other ways of funneling their dollars into politically useful channels, and the harassed members of Congress would have to continue to demean themselves by constant begging.

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[12] A variation of the idea of free television and/or mail, proposed by Common Cause and others, would provide for such privileges as a means of answering attacks made on candidates by allegedly independent organizations or individuals. See Fred Wertheimer, "Campaign Finance Reform: The Unfinished Agenda," this issue of *The Annals* of the American Academy of Political and Social Science.

[13] See ibid.

[14] The Obey-Railsback Act, which contained such restrictions, actually passed the House in 1979, but got no further. See ibid.

PAC regulation and all the other forms of statutory regulation suffer from one fundamental weakness: none of them would affect the multimillion-dollar self-financed campaign. Yet it is this type of campaign that does more than any other to confirm the widely held view that high office in the United States can be bought.

Short of a constitutional amendment, there is only one kind of proposal, so far as I know, that would curb the super-rich candidate, as well as setting limits for others. Lloyd N. Cutler, counsel to the president in the Carter White House, has suggested that the political parties undertake the task of campaign finance regulation.[15] Theoretically, the parties could withhold endorsement from candidates who refuse to abide by the party-prescribed limits and other regulations. But the chances of this happening seem just about nil. Conceivably a national party convention might establish such regulations for its presidential primaries, but to date most contenders have accepted the limits imposed under the matching system of public funding; John Connally of Texas was the exception in 1980. For congressional races, however, it is not at all clear what body or bodies could make such rules and enforce them. Claimants to such authority would include the national conventions, national committees, congressional party caucuses, various state committees, and, in some cases, county committees. Perhaps our national parties should be more hierarchically structured, but the fact is that they are not.

On top of all this, the system would work for general election campaigns only if both major parties took parallel action. If by some miracle they did so, the end result might be to encourage third-party and independent candidacies.

Let me make clear that I am not opposed to any of the proposals briefly summarized earlier. To the extent I had the opportunity to vote for any of the statutory proposals during my years in the House, I did so. Nor am I arguing that a constitutional amendment by itself would solve the problem; it would only be the beginning of a very difficult task. What I am saying is that, short of effective action by the parties, any system to reverse the present lethal trends in campaign financing must have as a basic element the restoration to the Congress of the authority to regulate the process.

THE MERITS OF THE *BUCKLEY* RULING

The justices of the Supreme Court were all over the lot in the *Buckley* case, with numerous dissents from the majority opinion. The most significant dissent, in my view, was entered by Justice White, who, alone among the justices, had had extensive experience in federal campaigns. White's position was that the Congress, and not the Court, was the proper body to decide whether the slight interference with First Amendment freedoms in the Federal Election Campaign Act was warranted. Justice White reasoned as follows:

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[15] See Lloyd N. Cutler, "Can the Parties Regulate Campaign Financing?" this issue of *The Annals* of the American Academy of Political and Social Science.

> The judgment of Congress was that reasonably effective campaigns could be conducted within the limits established by the Act. . . . In this posture of the case, there is no sound basis for invalidating the expenditure limitations, so long as the purposes they serve are legitimate and sufficiently substantial, which in my view they are. . . .
>
> . . . expenditure ceilings reinforce the contribution limits and help eradicate the hazard of corruption. . . .
>
> Besides backing up the contribution provisions, . . . expenditure limits have their own potential for preventing the corruption of federal elections themselves.[16]

Justice White further concluded that

> limiting the total that can be spent will ease the candidate's understandable obsession with fundraising, and so free him and his staff to communicate in more places and ways unconnected with the fundraising function.
>
> It is also important to restore and maintain public confidence in federal elections. It is critical to obviate and dispel the impression that federal elections are purely and simply a function of money, that federal offices are bought and sold or that political races are reserved for those who have the facility—and the stomach—for doing whatever it takes to bring together those interests, groups, and individuals that can raise or contribute large fortunes in order to prevail at the polls.[17]

Two of the judges of the District of Columbia Circuit Court, which upheld the 1974 act—judges widely respected, especially for their human rights concerns—later wrote law journal articles criticizing in stinging terms the Supreme Court's holding that the spending limits were invalid. For example, the late Judge Harold Leventhal said in the *Columbia Law Review*:

> The central question is: what is the interest underlying regulation of campaign expenses and is it substantial? The critical interest, in my view, is the same as that accepted by the [Supreme] Court in upholding limits on contributions. It is the need to maintain confidence in self-government, and to prevent the erosion of democracy which comes from a popular view of government as responsive only or mainly to special interests.[18]
>
> A court that is concerned with public alienation and distrust of the political process cannot fairly deny to the people the power to tell the legislators to implement this one-word principle: Enough![19]

Here are excerpts from what Judge J. Skelly Wright had to say in the *Yale Law Journal*:

> The Court told us, in effect, that money is speech.
>
> . . . [This view] accepts without question elaborate mass media campaigns that have made political communication expensive, but at the same time remote, disembodied, occasionally . . . manipulative. Nothing in the First Amendment . . . commits us to the dogma that money is speech.[20]
>
> . . . far from stifling First Amendment values, [the 1974 act] actually promotes them. . . . In place of unlimited spending, the law encourages all to emphasize less expensive face-to-face communications efforts, exactly the kind of activities that promote real dialogue on the merits and leave much less room for manipulation and avoidance of the issues.[21]

The Supreme Court was apparently blind to these considerations. Its treatment was almost entirely doctrinaire. In holding unconstitutional the limits set by Congress on total expenditures for congressional campaigns and on spending by individual candidates, the Court did not claim that the dollar limits set were unreasonably low. In the view taken by the Court, such limits were beyond the power of the Congress to set, no matter how high.

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[16] 424 U.S., pp. 263-64.

[17] Ibid., p. 265.

[18] Leventhal, "Courts and Political Thickets," *Columbia Law Review*, 77:362 (1977).

[19] Ibid., p. 368.

[20] Wright, "Politics and the Constitution: Is Money Speech?" *Yale Law Journal*, 85:1005 (1979).

[21] Ibid., p. 1019.

Only in the case of the $1000 limit set for spending by independent individuals or groups "relative to a clearly identified candidate" did the Court focus on the level set in the law. The Court said that such a limit "would appear to exclude all citizens and groups except candidates, political parties and the institutional press from any significant use of the most effective modes of communication."[22] In a footnote, the Court noted:

> The record indicates that, as of January 1, 1975, one full-page advertisement in a daily edition of a certain metropolitan newspaper cost $6,971.04—almost seven times the annual limit on expenditures "relative to" a particular candidate imposed on the vast majority of individual citizens and associations.[23]

The Court devoted far more space to arguing the unconstitutionality of this provision than to any of the other limits, presumably because on this point it had the strongest case. Judge Leventhal, too, thought the $1000 figure for independent spending was unduly restrictive and might properly have been struck down. As one who supported the 1974 act while in the House, I believe, with the benefit of hindsight, that the imposi-

Let us look for a moment at the question of whether reasonable limits on total spending in campaigns and on spending by wealthy candidates really do interfere with the "unfettered interchange of ideas," "the free discussion of governmental affairs," and the "uninhibited, robust and wide-open" debate on public issues that the Supreme Court has rightly said the First Amendment is designed to protect.[24] In *Buckley* the Supreme Court has answered that question in the affirmative when the limits are imposed by law under Congress's conceded power to regulate federal elections. The Court answered the same question negatively, however, when the limits were imposed as a condition of public financing. In narrow legalistic terms the distinction is perhaps justified, but, in terms of what is desirable or undesirable under our form of government, I submit that the setting of such limits is either desirable or it is not.

Various of the solutions proposed to deal with the campaign-financing problem, statutory and nonstatutory, raise the same question—for example, the proposal to allow tax credits only for contributions to candidates who have accepted spending limits, and the proposal that political parties should impose limits. All such proposals assume that it is good public policy to have such limits in place. They simply seek to avoid the inhibition of the *Buckley* case by arranging for some carrot-type motivation for the observance of limits, instead of the stick-type motivation of compliance with a law.

I am not, of course, suggesting that those who make these proposals are ong to do so. What I am suggesting is that they should support the idea of undoing the damage done by *Buckley* by way of a constitutional amendment.

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[22] 424 U.S., pp. 20-21

[23] Ibid., p. 21

[24] *Roth* v. *United States*, 354 U.S. 476, 484 (1957); *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966); *New York Times* v. *Sullivan*, 376 U.S. 254, 270 (1964)

Summing up the reason for such an amendment, Congressman Henry Reuss said, "Freedom of speech is a precious thing. But protecting it does not permit someone to shout 'fire' in a crowded theater. Equally, freedom of speech must not be stressed so as to compel democracy to commit suicide by allowing money to govern elections."[25]

INDEPENDENT EXPENDITURES IN PRESIDENTIAL CAMPAIGNS

Until now the system of public financing for presidential campaigns, coupled with limits on private financing, has worked reasonably well. Accordingly, most of the proposals mentioned previously for the amelioration of the campaign-financing problem have been concerned with campaigns for the Senate and the House.

In 1980 and 1984, however, a veritable explosion occurred in the spending for the presidential candidates by allegedly independent committees—spending that is said not to be authorized by, or coordinated with, the campaign committees. In both years, the Republican candidates benefited far more from this type of spending than the Democratic: in 1980, the respective amounts were $12.2 million and $45,000; in 1984, $15.3 million and $621,000.[26]

This spending violated section 9012(f) of the Presidential Campaign Fund Act, which prohibited independent committees from spending more than $1000 to further a presidential candidate's election if that candidate had elected to take public financing under the terms of the act. In 1983 various Democratic Party entities and the Federal Election Commission, with Common Cause as a supporting amicus curiae, sued to have section 9012(f) declared constitutional, so as to lay the groundwork for enforcement of the act. These efforts failed. Applying the *Buckley* precedent, the three-judge district court that first heard the case denied the relief sought, and this ruling was affirmed in a 7-to-2 decision by the Supreme Court in *FEC* v. *NCPAC* in March 1985.[27]

The *NCPAC* decision clearly strengthens the case for a constitutional amendment to permit Congress to regulate campaign spending. For none of the statutory or party-action remedies summarized earlier would touch this new eruption of the money-in-politics volcano.

True, even with a constitutional amendment in place, it would still be possible for the National Conservative Political Action Committee or other committees to spend unlimited amounts for media programs on one side of an issue or another, and these would undoubtedly have some impact on presidential—and other—campaigns. However, the straight-out campaigning for an individual or a ticket, which tends to be far more effective than focusing on issues alone, could be brought within reasonable limits.

LOOKING AHEAD

The obstacles in the way of achieving a reversal of *Buckley* by constitutional amendment are, of course, formidable. This is especially true today when the House Judiciary Committee is resolutely sitting on other amendments affecting the Bill of Rights and is not disposed to report out any such amendments.

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[25] U.S., Congress, House, *Congressional Record*, 97th Cong., 2d sess., daily ed., 128(81): H3901.

[26] *New York Times*, 19 Mar. 1985.

[27] *FEC* v. *NCPAC*, 105 S.Ct. 1459 (1985).

In addition to the practical political hurdles to be overcome, there are drafting problems to solve. The simple form so far proposed[28]—and quoted previously—needs refinement.

For example, if an amendment were adopted simply giving to the Congress and the states the authority to "enact laws regulating the amount of contributions and expenditures intended to affect elections,"[29] the First Amendment question would not necessarily be answered. The argument could still be made, and not without reason, that such regulatory laws, like other powers of the Congress and the states, must not offend the First Amendment. I asked an expert in constitutional law how this problem might be dealt with, and he said the only sure way would be to add the words "notwithstanding the First Amendment." But such an addition is not a viable solution. The political obstacles in the way of an amendment overturning *Buckley* in its interpretation of the First Amendment with respect to campaign spending are grievous enough; to ask the Congress—and the state legislatures—to create a major exception to the First Amendment would assure defeat.

The answer has to be to find a form of wording that says, in effect, that the First Amendment can properly be interpreted so as to permit reasonable regulation of campaign spending. In my view, it would be sufficient to insert in the proposed amendment,[30] after "The Congress," the words "having due regard for the need to facilitate full and free discussion and debate." Section 1 of the amendment would then read, "The Congress, having due regard for the need to facilitate full and free discussion and debate, may enact laws regulating the amounts of contributions and expenditures intended to affect elections to federal office." Other ways of dealing with this problem could no doubt be devised.

Another drafting difficulty arises from the modification in the proposed amendment of the words "contributions and expenditures" by "intended to affect elections." This language is appropriate with respect to money raised or spent by candidates and their committees, but it does present a problem in its application to money raised and spent by allegedly independent committees, groups, or individuals. It could hardly be argued that communications referring solely to issues, with no mention of candidates, could, consistent with the First Amendment, be made subject to spending limits, even if they were quite obviously "intended to affect" an election. Accordingly, a proper amendment should include language limiting the regulation of "independent" expenditures to those relative to "clearly identified" candidates, language that would parallel the provisions of the 1971 Federal Election Campaign Act, as amended.[31]

These are essentially technical problems that could be solved with the assistance of experts in constitutional law if the Judiciary Committee of either house should decide to hold hearings on the idea of a constitutional amendment and proceed to draft and report out an appropriate resolution.

Many of those in and out of Congress who are genuinely concerned with political money brush aside the notion of a constitutional amendment and focus entirely on remedies that seem less drastic. They appear to assume that Congress is more likely to adopt a statutory remedy, such as public financing, than to go for an enabling constitutional amendment that could be tagged as tampering with the Bill of Rights. I disagree with that assumption.

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[28] U.S. Congress, House, *Contributions and Expenditures*, H.J. Res. 628.

[29] Ibid.

[30] Ibid.

[31] 2 U.S.C.A. § 431(17).

Incumbents generally resist proposals such as public financing because challengers might be the major beneficiaries, but most incumbents tend to favor the idea of spending limits. The Congress is not by its nature averse to being given greater authority; that would be especially true in this case, where until 1976 the Congress always thought it had such authority. I venture to say that if a carefully drawn constitutional amendment were reported out of one of the Judiciary Committees, it might secure the necessary two-thirds majorities in both houses with surprising ease.

The various state legislatures might well react in similar fashion. A power they thought they had would be restored to them.

The big difficulty is to get the process started, whether it be for a constitutional amendment or a statutory remedy or both. Here, the villain, I am afraid, is public apathy. Unfortunately, the voters seem to take excessive campaign spending as a given—a phenomenon they can do nothing about—and there is no substantial constituency for reform. The House Administration Committee, which in the early 1970s was the spark plug for legislation, has recently shown little interest in pressing for any of the legislative proposals that have been put forward.

The 1974 act itself emerged as a reaction to the scandals of the Watergate era, and it may well be that major action, whether statutory or constitutional, will not be a practical possibility until a new set of scandals bursts into the open. Meanwhile, the situation will only get worse.

Senator Heflin. Professor Dellinger, we are delighted to see you here—if you would go ahead.

STATEMENT OF WALTER DELLINGER

Mr. Dellinger. Senator, we have at the table with me two of the counsel in *Buckley* v. *Valeo.* Mr. Cutler supported the congressional legislation. Mr. Gora was one of those who argued that it was unconstitutional.

My position, so you will know what it is, is that I do not have as great a reservation as Gora about amending the Constitution to limit campaign expenditures.

Though I share some of Mr. Gora's concerns, I nonetheless agree with Mr. Cutler that the enormous campaign expenditures and the gruesome process of raising those funds threaten seriously to distort the electoral process and to call into question the integrity of government.

I do not have concerns about the particular proposals before the committee. Even if one were to conclude, as I think I would, that *Buckley* v. *Valeo* was an unfortunate decision and even if one were to conclude we would be better off with the state of the law as it would have been if *Buckley* had not been decided the way it was decided, there are serious problems, I am afraid, with the particular proposed amendments that are before this committee.

I think in particular Senate Joint Resolution 21 proposed by Senator Hollings and a number of cosponsors raises very serious questions. I think Senator Roth's proposal is an improvement. I think Mr. Cutler's proposal for the Committee on the Constitutional System considerably better yet and perhaps indicates the proper direction in which this committee could go in developing an amendment that did not raise the concerns that Senator Specter expressed about an undue tampering with the first amendment.

If you look at Senate Joint Resolution 21, the Hollings proposal, it is beguilingly simple. But, it either does nothing at all or far too much. It says, simply, the Congress may enact laws regulating the amount of contributions and expenditures intended to affect elections to Federal offices. Now, if that were merely an addition to the powers of Congress, to article I, section 8, but still subject to the other constitutional restrictions, freedom of speech, equal protection, I think it would be, all would agree, unnecessary. Congress quite clearly has the legislative authority to enact legislation dealing with the contributions and expenditures for Federal offices and such power has been exercised for many years.

The critical question is thus whether the proposed amendment is intended to trump other provisions such as the first amendment—as it apparently is intended to do—in which case, I think, it cuts too far. I presume that what it means is that "notwithstanding any other provision of the Constitution" or that "nothing in this Constitution shall be construed to prohibit" the enactment of these laws—including the first amendment.

The Hollings amendment as now drafted would do far more than return the law to what it would have been had one of the dissenting positions in *Buckley* v. *Valeo* been adopted. It has the same problem that I perceived in some of the school prayer amendments.

When you take an area now covered by the Constitution and exempt it from constitutional scrutiny, you create something like a constitutional black hole within the confines of the area that is exempted. That is what Senate Joint Resolution 21 would do. If that were adopted and ratified by the States, I would see no constitutional objection to a provision that provided that the candidates of the Republican Party could spend not more than $1 million and the candidates of the Democratic Party not more than $1.29.

It would certainly allow Congress to regulate editorials that were intended to affect election for Federal offices if those editorials involved expenditures, as surely they do in the publication of magazines and newspapers.

I think, in short, that by essentially removing from judicial scrutiny the area of contributions and expenditures altogether it would cut far more deeply than merely overruling *Buckley*.

Now, there are two other proposals before the committee that would retain some judicial review by authorizing Congress only to establish "reasonable" limitations on expenditures for Federal offices. Now, one might immediately raise the question, as Senator Specter did, of what is meant by reasonable. One even could imagine a hostile Supreme Court treating such an amendment as meaningless on the grounds that any expenditure which was inconsistent with the first amendment as previously interpreted was per se unreasonable and, therefore, did not fall within the amendment.

But I think that the intended effect of Senator Roth's amendment—and the amendment which is drafted in a superior fashion by Mr. Cutler—is to suggest to the Court that it ought to apply a less severe standard of review to good faith efforts by the Congress to deal with problems of campaign expenditures. That is perhaps the technical effect of providing that Congress shall have the power to set reasonable limits.

Let me note in passing the technical superiority of Mr. Cutler's proposal as compared with Senator Roth's proposal. Mr. Cutler's proposal applies not to all expenditures but only to "campaign" expenditures. Campaign expenditures as an additional modifier would tend to eliminate the capacity of the Congress to regulate the press or others whose expenditures might affect an election but were not themselves actual campaign expenditures.

Mr. Cutler's proposal has better language in eliminating the phrase "any person," by referring to expenditures "by or in support of any candidate." I think these word changes tend to lessen the concerns that I have.

Even the McConnell proposal which speaks of allowing Congress to regulate independent expenditures which "expressly advocate the election or defeat of a person," without putting in some qualifier such as reasonable, that would give the courts a capacity to review the extremes, is troublesome. You may recall, for example, the National Review with a fairly glamorous cover of Representative Kemp a few months ago or more recently the New Republic with a glamorous oil painting of Senator Gore on its cover, and a lead article that proposes that he be either nominated or canonized. I think all of us would agree that either of those are a part of a system of expression that we would not want to limit and would not want to give Congress the power to control.

Yet, as I look at the McConnell amendment, these cover stories could be construed as independent expenditures expressly advocating the election of a candidate for Federal office.

Let me close by saying that it would seem that if one were to have an amendment designed to overturn *Buckley*, if you were trying to confine the amendment so it did not cut more deeply into freedom of expression, that essentially what we want to accomplish is to overturn that aspect of *Buckley* in which the Court holds that the constitutionality of expenditure limits turns on whether the government interest advanced in its support satisfies the exacting scrutiny applicable to core first amendment rights.

I think there is a very good argument to be made that an amendment which allowed "reasonable" limitations would have the effect technically of removing the spector of "exacting" scrutiny of expenditures. In support of a constitutional amendment one might argue that expenditure limitations do not restrict the quantum or quality of speech, but may, in fact, enhance the quality and content of our expression by preventing some voices from drowning others out or leaving us awash in a sea of money.

With that in mind, I think a desirable amendment might establish a modest standard of judicial review by saying Congress shall have the power to set such reasonable limits on expenditures as are necessary to advance substantial and legitimate government interests. This would permit judicial review of those future laws that might unfairly bias or distort in a partisan way the electoral process while still permitting the enactment of expenditure limitations similar to those that Congress sought to achieve before its efforts were curtailed by *Buckley* v. *Valeo.*

[Proposed amendments to be discussed by Prof. Walter Dellinger follow:]

Proposed Amendments to be Discussed by
Professor Walter Dellinger

1. S.J. Res. 21 (Hollings): The Congress may enact laws regulating the amounts of contributions and expenditures intended to affect elections to Federal offices.

2. S.J. Res. 130 (Roth): Congress may by law establish reasonable limitations on expenditures made by any person with respect to the candidacy of any person for the Office of President, Vice President, Senator, Representative, or any other office within its jurisdiction. The several States may by law establish reasonable limitations on expenditures made by any person with respect to the candidacy of any person for any other office within their respective jurisdictions.

3. Committee on the Constitutional System/ Cutler: Congress shall have power to set reasonable limits on campaign expenditures by or in support of any candidate in a primary or general election for federal office. The States shall have the same power with respect to campaign expenditures in elections for state and local offices.

4. Dellinger: Congress shall have power to set [such] [reasonable] limits on campaign expenditures by or in support of any candidate in a primary or general election for federal office [as are necessary to advance substantial and legitimate governmental interests].

Senator HEFLIN. Thank you.

Delighted to hear from you now, Professor Gora.

STATEMENT OF JOEL GORA

Mr. GORA. Thank you, Senator.

My name is Joel Gora. I appear here today on behalf of the American Civil Liberties Union in strong opposition to these proposed constitutional amendments. As a lawyer and constitutional law teacher, it is an honor to talk about the Constitution and proposed amendments to it, but as someone who has spent a good deal of time trying to deal with the problems of government restriction of political speech, I think these amendments are a very bad idea.

The Supreme Court has said time and again that our political system is predicated on the need for free, robust discussion of public issues and the conduct of public officials.

Speech about politics and government is more than self-expression, the Court has said. It is the essence of self-government. I fear that these amendments will cut to the heart of those first amendment and constitutional principles by giving to the Congress or to the States or to both the power to restrict the ability of groups and individuals to communicate their views about candidates or causes.

The purpose of some of these amendments is to overrule the *Buckley* decision and its holding that restrictions on campaign funding are restrictions on political speech. But I fear the consequence of the proposed amendments would be to overrule well more than just the *Buckley* decision.

Let me focus for just a moment on Senate Joint Resolution 21, which I believe is Senator Hollings' proposal. It would allow government control of all political activities intended to affect Federal elections by giving Congress plenary power to regulate and limit the amounts of funds going to such activities.

With the *Buckley* decision overruled and the principles that it embodied in limbo, there would be no effective constitutional yardstick to measure campaign finance restrictions. Congress could reduce allowable contributions or expenditures to any minimum level it chooses. It could prohibit candidates from spending any more than a modest amount of personal funds to communicate their views to the people. Congress, could, as it did in 1974 in the statutes we challenged, make it a Federal crime for independent citizens to spend more than $1,000, which would buy you then an eighth of a page in the New York Times and today presumably a tombstone advertisement at the bottom of the page. Congress made it a Federal crime for citizens to spend more than $1,000 on an advertisement in a newspaper criticizing the President of the United States or a Member of Congress and urging that he or she be defeated at the polls.

The Supreme Court invalidated that provision in unqualified language. But under this proposed amendment Congress could regulate beyond independent spending as well. It could regulate the news media, public interest groups, all those whose speech activities might conceivably come within the intent to affect elections to Federal office.

So I think the breadth of these proposals is extremely disturbing. I think what bothers me most, and it relates to a point that Professor Dellinger elaborated on, is that Senate Joint Resolution 21—and I might feel differently about Mr. Cutler's proposal, I haven't studied it—but Senate Joint Resolution 21 would basically take the Supreme Court out of play on these issues. The Supreme Court's role as final arbiter of the validity and fairness of restrictions on political speech is a central part of our constitutional system. We have relied on the Supreme Court to prevent the dominant political forces in the country from freezing the political status quo and freezing out challengers and dissidents and insurgents.

Under these proposals that role of the Supreme Court in the constitutional system—to make sure that the rules of politics and the rules of political speech are fair as well as open—would be totally eliminated. The problem would be magnified by giving States the power to regulate campaign finances and keeping the Supreme Court from reviewing those issues as well.

So from the point of view of the constitutional system, as well as from the point of view of freedom of speech, we have a great many of problems with these proposed constitutional amendments.

In 1974 when Congress enacted sweeping campaign finance controls, the ACLU charged that the law was an incumbent protection act. Now regrettably you have before you proposals for an incumbent protection amendment. We said then that the expenditure limits would generally protect incumbents by magnifying enormously the great advantages and resources available to incumbents. We said then that the contribution limits would favor incumbents who could host $1,000-a-plate dinners. Control on independent expenditures would stifle the critics of incumbent performance. Pervasive enforcement mechanisms to monitor nonpartisan advocacy would interfere with free speech values as well. I think these concerns which were on our mind in 1974 are no less pressing today.

Let me conclude by quoting very briefly from the Supreme Court decision in *Buckley,* which has been much maligned. The Court said: "In the free society ordained by our Constitution it is not the government but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign." I think those principles under the old first amendment have served us well. I think that there are ways that campaign finance problems can be addressed within the current constitutional framework, but I do not think we need an exception to the first amendment.

Thank you, Senator.

Senator **Heflin**. Thank you.

[The prepared statement of Professor Gora follows:]

STATEMENT OF JOEL M. GORA

Professor of Law

Brooklyn Law School

On Behalf Of

THE AMERICAN CIVIL LIBERTIES UNION

ON PROPOSALS TO AMEND THE CONSTITUTION TO PERMIT GOVERNMENT TO REGULATE AND RESTRICT CAMPAIGN FINANCE

Before the

SUBCOMMITTEE ON THE CONSTITUTION

Of The

COMMITTEE ON THE JUDICIARY

U.S. SENATE

March 17, 1988

My name is Joel M. Gora. I am a Professor at Brooklyn Law School, where I teach Constitutional Law. I am also a General Counsel of the New York Civil Liberties Union and a former National Staff Counsel of the American Civil Liberties Union. In that capacity, I have been actively involved since 1972 in studying and litigating the constitutionality of campaign finance restrictions. I was one of the attorneys for the plaintiffs in Buckley v. Valeo, 424 U.S. 1 (1976), which is the target of the proposals before you to amend the Constitution of the United States. I appear here today, on behalf of the ACLU, in strong opposition to these proposals.

As a lawyer and a constitutional law teacher, it is a privilege and an honor to be requested to appear before this Committee to discuss an occasion as potentially momentous as a proposed amendment to our Constitution. But having been extensively involved in defending First Amendment and free speech principles against government restrictions, particularly those embodied in most campaign finance laws, I think these proposed constitutional amendments pose grave danger to First Amendment values and thus to the essence of self-government.

1. The ACLU believes that government restrictions on political campaign funding infringe on freedom of speech and association.

The ACLU perspective on the dangers to free speech posed by campaign finance controls was shaped from the very outset when in

1972 the brand new reform laws were almost immediately used by the federal government to bring suit against a handful of dissenters who had sponsored a newspaper advertisement in _The New York Times_ calling for the impeachment of President Nixon. The ACLU successfully defended those dissenters, but ever since then we have viewed campaign finance restrictions with great skepticism. They appeared to us not so much as benign efforts to reform politics, but suspect attempts to restrict political speech and stifle citizen criticism of government.

That is why the ACLU believes that limitations on contributions or expenditures made for the purpose of advocating causes or candidates in the public forum impinge directly on freedom of speech and association and should generally be opposed. Government restrictions on political expenditures and contributions inevitably have two unacceptable consequences: (1) limiting the quantity of political resources directly restricts the quality and content of political speech, and (2) allowing government to monitor and control political speech in order to enforce such limitations is deeply disruptive of political freedom. Moreover, we do not believe that compelling governmental interests necessitate such restrictions and control of political funding. Two such interests are usually advanced: deterring governmental corruption and equalizing political opportunity.

The corruption concern is not present when a candidate uses his or her own resources or family resources to fund a campaign. Disclosure is an effective antidote to any potential corruption or undue influence where candidates rely heavily on the contributions of others.

The equality principle, which seeks to limit some individuals and groups in order relatively to enhance the political opportunity of others, seems inherently boundless and practically futile. First, of course, the powerful incumbency factor will always upset the political balance and undermine the goal of equal political opportunity. Moreover, if the equality principle justifies restricting the funds that candidates themselves can raise and spend--even those who rely on small contributions--then the sought-after equilibrium can easily be undone by extensive independent expenditures in a campaign. Accordingly, those too will then have to be controlled and restricted, as the proposals before you clearly contemplate. If that drastic step is taken, there remains the problem of the influence in a campaign of powerful media voices or issue-oriented organizations which may have an impact on the election. They will have to be restricted and controlled as well. To pursue the equality concern to these extreme lengths--to seek to monitor and control all speech which might affect the climate of opinion in an election--would radically change the nature of political discussion and debate in America. To fail to do so casts doubt on the efficacy of the attempt to equalize political opportunity by restricting political activity. Surely we can find better ways to enhance political access than by restricting political speech.

2. The proposed constitutional amendments are a dangerous threat to our core constitutional values of freedom of speech, press, association and petition.

The three proposals before you magnify these concerns enormously because, if adopted, they would enshrine in the Constitution itself the power of government to restrict campaign activity and hence political speech. The leading proposal, and perhaps the most sweeping, is S.J.Res. 21, which would provide as follows:

> "The Congress may enact laws regulating the amounts of contributions and expenditures intended to affect elections to Federal offices."

The purpose of such proposals is to overturn the Supreme Court decision in Buckley v. Valeo, which held that restrictions on campaign expenditures are restrictions on campaign speech and thereby prohibited by the First Amendment. Both the intended and unintended consequences of the proposals would pose the gravest dangers to freedom of speech, which Justice Cardozo described as "the matrix, the indispensible condition of nearly every other form of freedom."

Our political and constitutional system is predicated on the necessity of free, uninhibited and robust discussion and debate of public issues, politics and government. Justice Brandeis observed that, "public discussion is a political duty." Indeed, speech about government and politics is more than self-expression; it is the essence of self-government. The proposed constitutional amendments would cut to the heart of our democratic system, by empowering the Congress or the States to restrict severely the ability of individuals and groups to communicate their views about candidates or causes if such advocacy were in any way "intended to affect" federal or local elections. By placing the regulation of political funding almost wholly at the mercy of government, these proposals would turn the free speech legacy of Holmes, Brandeis, Black, Douglas and Brennan on its head.

3. The proposed constitutional amendments would permit unacceptably sweeping and severe regulation of our system of political expression.

Each of the various proposed amendments would grant to Congress what the Supreme Court held that the First Amendment denied: plenary legislative control over the regulation of campaign finances. Since the common purpose of the proposals is, in varying degrees, to carve out an "exception" to the First Amendment principles announced by the Court, there would presumably no longer be any constitutional baseline against which to measure any "regulation" of the amount of campaign finances "intended to affect" federal elections. Congress or the States would have largely unfettered discretion under any one of these new First Amendments to dictate the nature, scope and enforcement of campaign finance legislation.

Since prior constitutional interpretation holds that the power to "regulate" includes the power to prohibit, under both

S.J.Res 21 and S.J.Res. 166, Congress could conceivably outlaw any personal campaign expenditures by a candidate and force candidates to rely solely on public funding--at whatever inadequate level a Congress full of incumbents might choose. Alternatively, the Congress could make it a federal crime for a candidate to spend a relatively modest amount to personally sponsor a newspaper advertisement stating his or her views on public issues and asking the voters for their support. Under any theory of free speech--individual self-expression, democratic self-government, the market place of ideas--that is a chilling and intolerable prospect. The Supreme Court in Buckley held that such a restriction violated our current First Amendment; but, of course, the purpose of these proposed amendments is to overturn that ruling.

By the same token Congress could reduce the amount of allowable political contributions from $1,000 to $500 or even $100, thus effectively prohibiting all private contributions except for the most modest expression of support by contributors for a candidate or his or her campaign. By what constitutional yardstick could such regulation and reduction of the amounts of campaign funding be measured?

Nor does it improve matters significantly to specify, as does S.J.Res 130, that Congress or the States may set "reasonable" limitations on political expenditures. Most challengers or insurgents might have a different view of "reasonable" spending limits than do most incumbents or majority parties; and it is the latter who will write the rules. In 1974, Congress thought that $1,000 was a reasonable limit on independent political expenditures and, in effect, made it a federal crime for any one to place a small one-eighth page advertisement in The New York Times criticizing the President of the United States and urging people to vote against him. That was a breathtaking provision that effectively suppressed a primary forum of citizen dissent from government policy. In the Buckley decision the Supreme Court condemned that restriction in unqualified terms. A decade later the Court, with only two dissents, reaffirmed the principle that independent political expenditures could not be restricted. See: FEC v. National Conservative Political Action Committee, 470 U.S. 480 (1985). With Buckley overruled by constitutional amendment, would that restriction now be viewed as "reasonable?"

Even more alarming is the prospect that Congress could ban any political expenditures by independent groups and individuals without recourse. The ability of citizens, individually or in groups, to publiclly criticize political candidates, government officials and government policy is one of the mainstays of our democratic system. Under any of these new First Amendments, such core political speech could be suppressed by totally prohibiting the expenditures required to enable such criticism.

Just as Congress would be the sole judge of "regulating the amounts," and thereby the nature of campaign finance, so too, under S.J.Res.21, Congress would be free to apply such controls to any contributions or expenditures "intended to affect" federal elections. Would that include news coverage or editorial endorsements by the press? In the past, government tried to prosecute the press for publishing editorial endorsements which might "influence" the public on election day. The Supreme Court held that a violation of the old First Amendment. How would the matter be decided under some new one?

The reach of the "intended to affect" language is of particular concern to groups such as the ACLU. Like so many other non-partisan, issue-oriented organizations, we regularly comment on public policy, including the performance of elected officials, or inform our members or the public about the voting records of such officials on issues of concern. In the past, the government has attempted repeatedly and unsuccessfully to bring such issue discussion within the reach of campaign finance laws. Indeed, in 1974, as part of the sweeping campaign reforms, Congress included a provision explicitly intended to regulate groups like Common Cause, the Sierra Club, and the ACLU, because these organizations publish "box scores" rating the performance of Members of Congress. In the Buckley case, the lower court unanimously ruled that the First Amendment prohibited such government regulation of non-partisan efforts to influence public opinion. Several other courts have reached similar conclusions. And the Supreme Court in Buckley, in order to cure the First Amendment vagueness and overbreadth of statutory terms such as "for the purpose of influencing an election," sought to fashion a bright-line distinction between express partisan advocacy, which can be subject to some campaign finance regulations, and issue advocacy, which cannot. At least S.J.Res. 166, on its face, appears to hew to this carefully-crafted distinction. But S.J.Res. 21 does not and would permit Congress to regulate contributions or expenditures "intended to affect" federal elections. Since Buckley is to be overturned, could issue speech now be regulated or restricted on the ground that expenditures for such speech are "intended to affect" an election?

Our severe concerns about the reach of S.J.Res. 21 are underscored by the pervasive problem of enforcement. Giving government the power to regulate expenditures "intended to affect" elections invites intensive and disruptive official scrutiny of all public speech even arguably within that zone. That has certainly been our experience with enforcement ever since the 1972 reforms, which were immediately applied against an ad hoc group that sponsored a newspaper advertisement urging the impeachment of President Nixon. The government claimed that the ad was for the purpose of influencing the outcome of the fall elections. The ACLU won that case, but the government has frequently applied campaign laws in an exceedingly sweeping fashion, despite warnings from the courts. In recent years, harassing complaints have been filed with the Federal Election Commission claiming that a whole host of non-partisan organizations, such as the ACLU, had violated federal campaign law restrictions because of their criticism of President Reagan's policies. Although the Commission ultimately dropped these charges, we were forced to spend considerable time, effort and resources to defend the right to criticize the President without official examination or sanction. As Justice Marshall once observed: "The value of a Sword of Damocles is that it hangs--not that it drops."

Under the broad "intended to affect" language, it is thus possible that individuals, political candidates, political parties, labor unions, corporations, political action committees, issue organizations, interest groups, and even the media could all be subject to restrictive regulation of the resources they can employ for public and political advocacy. Ironically, if the ability of these groups and individuals to use resources to discuss public issues and political figures is diminished, the relative power of government and its officials to shape public opinion will be enhanced.

4. The proposed amendments raise extremely uncertain questions of constitutional interpretation.

These possibilities are not far-fetched speculations. They are precisedly the consequences--intended or unintended--of the proposed amendments. The avowed purpose is to overrule the key features of the Buckley decision and with it, presumably, the First Amendment principles of freedom of speech, press, association and self-government upon which that decision was explicitly and squarely based. The Buckley ruling was not a sport. It was solidly grounded in settled First Amendment principles. These included: (1) that "discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution;" (2) that this "reflects our profound commitment to the principle that debate on public issues should be uninhibited, robust and wide-open'"; and (3) that the First Amendment "protects political association as well as political expression." 424 U.S. at 14, 15. Moreover, in striking down limitations on independent expenditures, the Court centrally relied on two important free press cases, Mills v. Alabama, 384 U.S. 214 (1966) and Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). The Buckley ruling and the principles it applied have been reaffirmed by the Court several times in the decade since it was decided. Just recently, Justice Brennan confirmed Buckley's recognition that "independent expenditures constitute expression 'at the core of our electoral process and of the First Amendment freedoms.'" FEC v. Massachusetts Citizens For Life, 107 S.Ct. 616, 624 (1986)(plurality opinion). Without those principles, and with a new First Amendment, the courts and the country will be totally at sea in uncharted constitutional waters.

That raises another very serious objection to these proposals, namely, how would a new amendment mesh or interlock with the existing constitutional provisions and structure? Would it only overrule the specific holding of Buckley on candidate, campaign and independent expenditures, but not disturb the underlying First Amendment principles of speech, press and association upon which the ruling was based? If shifting partisan majorities in Congress decide that the new amendment permits regulation of election day editorial endorsements by newspapers or election day exit polls by the networks, can the media still argue freedom of the press or does the new amendment control? If Congress provides total campaign subsidies only for Democrats and Republicans, and absolutely none for independent or third party candidates, can those excluded from the funding claim a denial of equal protection of the laws, or is such a claim preempted? For example, S.J.Res. 166 would seem to allow federal and state regulation of independent expenditures, except those made by a political party; apparently, the parties could speak, but the people could not. Could that distinction be challenged under equal protection guarantees, or the equality component of the First Amendment? Likewise, Justice Brandeis'classic exposition of free speech was premised to a great extent on principles of individual liberty and self-development. May a candidate or independent speaker claim that Congressional restrictions on personal campaign expenditures constitute a deprivation of "liberty" under the Fifth Amendment, quite apart from the now-superceded protections of the First?

The point is that we are not used to having a second First Amendment and there will be great uncertaintly about how it meshes with the first one, as well as with other pertinent constitutional provisions.

5. Less drastic and dangerous alternatives are available within the framework of current First Amendment doctrine.

Surely a profound change in our constitutional course, with such perils and uncertainties, should not be embarked upon if there are less drastic alternatives available within the existing constitutional framework. That political campaigns have become more costly is apparent. But the causes and consequences of this are far less clear. As one observor has noted: "American politics is not overpriced but underfinanced." The responsible approach is to seek out solutions that maximize political speech and activity, not by limiting those groups and individuals whose resources permit them to engage in speech and association, but by improving the ability of those who lack such resources to participate in the political process. That approach harmonizes free speech and greater political participation without sacrificing the former in an illusory quest for the latter.

One solution would be to lift the current $1,000 ceiling on individual contributions to federal campaigns. That would encourage political access and opportunity, considerably ease fund-raising difficulties, and reduce the relative influence of political action committees. Concerns with undue influence could be addressed by requiring effective disclosure of large contributions. By virtue of inflation alone, a $1,000 contribution supports far less speech for a candidate and allows far less access or influence by a contributor. Indeed, just last week, The New York Times, long a supporter of campaign reform proposals, editorially urged that, in light of the funding demands imposed on Presidential candidates by the "Super Tuesday" primaries, "the obsolete $1,000 limit on individual contributions ought to be raised," so that Presidential contenders could more quickly and easily generate campaign funds. See: New York Times, March 10, 1988, p. A30.

Another possible alternative is a system of public financing to facilitate candidacy and broaden the spectrum of campaign debate by providing meaningful floors to encourage political speech and not ceilings to restrict it. Such a system should make funds available in equal amounts to all legally-qualified candidates once they have demonstrated some objective measure of political support. Another method is to reintroduce a system of tax deductions or tax credits for modest individual political contributions.

To the extent efforts to limit campaign finances are based on concerns over undue influence, full disclosure of large contributions to candidates and campaigns permits the voters to make such judgments. Indeed, the best antidote to excessive campaign contributions and expenditures, if one is required, is that such campaigns may become politically counter-productive when a candidate's funding activities are made a campaign issue for the voters. Big spenders are not necessarily big winners. Just look at the most recent round of Senate elections in 1986.

Such a remedy, democratically supplied by the people, is the kind contemplated by the existing First Amendment. Until these and other remedies are found wholly wanting, we should not embark on the uncertain path of fashioning a new one.

Summary

Statement of Joel M. Gora
American Civil Liberties Union

The American Civil Liberties Union strongly opposes these proposed Constitutional amendments that would permit plenary government regulation of political campaign funding. These proposals pose a grave danger to the values of political speech and association, and thus to the essence of self-government.

1. The ACLU has long been critical of campaign finance restrictions because they limit the ability of individuals or groups to advocate candidates and causes in the public forum and require government monitoring and control of political activity. We share the concerns over preventing corruption, improving political access and opportunity and preserving the integrity of our electoral processes. But we reject the necessity to secure those objectives by limiting political expenditures and contributions, and thus controlling political speech.

2. The proposed amendments would authorize such restrictions by enshrining the power to impose them in the Constitution itself. The purpose is to overturn the Supreme Court ruling in Buckley v.Valeo, (1976) which held that restrictions on campaign funding are restrictions on campaign speech and thus violative of First Amendment principles. The effect would be to wholly undercut the free speech legacy that those principles represent.

3. S.J.Res. 21, for example, would allow government control of all political activities "intended to affect" federal elections, by giving Congress plenary power to regulate and limit the amounts of funding of such activities. With the Buckley decision overruled, and the principles it embodied in limbo, there would be no effective constitutional yardstick to measure campaign finance restrictions. Congress could severely reduce allowable contributions or expenditures to any minimal level it chooses. Congress could prohibit a candidate from spending any more than a modest amount of personal funds to communicate his or her views to the voters and ask for their support. Congress could, as it did in 1974, make it a federal crime for independent citizens to spend more than $1,000 on a small newspaper advertisement criticizing the President of the United States--or a Member of Congress--during an election season. Congress could broadly define "intended to affect" as allowing regulation of the news media, public interest groups and all whose speech activities might conceivably come within that zone. Government has tried to impose such controls in the past, but decisions like Buckley stood in the way. Now such obstacles would be removed.

4. A new amendment would raise difficult problems of constitutional interpretation. Could free press or equal protection guarantees still be used to challenge campaign finance laws, or would the new amendment preempt those protections as well?

5. Given these perils and uncertainties, the prudent course would be to address the problems of campaign finance under the First Amendment we now have, not to create an exception to it.

Senator **Heflin**. Unfortunately, I have to be at another place. Senator Specter, if you conclude your questioning, will you adjourn the hearing?

Senator **Specter** [presiding]. Thank you, Mr. Chairman. I shall. Professor Gora, you say you have not had an opportunity to take a look at Mr. Cutler's proposed amendment.

Mr. **Gora**. That is correct, Senator.

Senator **Specter**. I think the committee generally would appreciate it if you would review it, see perhaps if it is the lesser or least of the available evils.

Mr. **Gora**. I do not want to get your hopes up. Although it might be a bit of an improvement over Senate Joint Resolution 21, I think any constitutional amendment in this area, which, either in a sweeping plenary fashion or even in an attempted limited fashion, gives Congress power to control contributions and expenditures intended to affect, to influence, for the purpose of influencing, whatever language you want, political activity is a bad law.

Senator **Specter**. I understand your position. You have made it abundantly clear; but if we are to err, you may prefer us to err as little as possible. It might be you might even have a recommendation which would lead us to err even less, but I will leave that to you.

Mr. **Gora**. I will be happy to submit that.

Senator **Specter**. Professor Gora, I understand the role of the American Civil Liberties Union and your organization has done an extraordinary job over the years in commenting upon many issues and while no one always agrees with everyone on anything necessarily, we are very interested in your views and your particular directions for civil liberties. But what about the public policy aspects of the unlimited campaign finance? Are you troubled by the comments which have been made today about money being pernicious and we are spending too much time and lots of problems exist with the current system?

Mr. **Gora**. Well, it is clear that campaign finance presents problems. One expert has said it is not so much a problem of being overpriced as underfunded. I think the Civil Liberties Union's instinctive approach to the problems of campaign finance are to try to expand the sources and the subsidies for political speech and not to restrict them. It takes a mind more attuned to the paradoxical than mine to understand how we can enhance political speech by limiting it, and the ACLU's approach is to seek to raise the ability to fund politics.

Senator **Specter**. You would like to see public financing perhaps?

Mr. **Gora**. We favor public financing in principle. We would view it as the government providing in effect seed money or seed resources to eligible candidates. It would not have to take the form of direct payments. It could as well take the form of a frank, free telephone or limited cost television time.

Senator **Specter**. Free television?

Mr. **Gora**. Perhaps, yes.

Senator **Specter**. You think Congress has the power to do that?

Mr. **Gora**. If that is a first amendment matter or within congressional power, I haven't thought that through.

Senator **Specter**. Does the TV company have any civil rights?

Mr. **Gora**. Frequently, but the courts have said their first amendment rights are not co-extensive of those with the print media, and in fact I believe the Court upheld the statute providing for paid access by political candidates to television commercial time. But there are—I think the simplest thing that could be done is to raise the individual contribution limit. That may sound like an unusual idea except even the New York Times, which has generally supported campaign controls of one kind or another, said a week ago that the $1,000 limit in Presidential campaigns is obsolete and too low. I think one of the reasons both incumbents and challengers have so much difficulty raising money is because of that $1,000 cap. Our feeling has always been that people should be allowed to contribute as much as they want to support political speech and activity, subject to the controls and limitations of effective and full disclosure. So in our view the civil liberties way to deal with these problems is to make it easier for candidates and their supporters to speak and not more difficult.

Senator **Specter**. You would support no limit on what an individual could contribute to a candidate?

Mr. **Gora**. That is correct, as long as there is full disclosure. The reason for that is simple. If the public knows that a Member of Congress or a candidate for Congress has gotten $1 million from the local businessmen, under our democratic system the people can decide they do not want that recipient of $1 million in office.

I must say that one thing that has impressed me in the years that these issues have been discussed is that proposed limits on funding are predicated on a cynical view about the electorate. I think people, voters, if presented with information about the campaign financing of the candidates will take that into account. I think campaign financing perhaps does become an issue in particular campaigns and big spending does not necessarily mean big winning, because the people decide they will not vote for that particular candidate, and the Senate elections in 1986 proved that.

Senator **Specter**. Mr. Cutler, you commented that you feel it is not possible to constitutionally limit political action committees. PAC's came into existence, as I understand it, because of the provisions of Federal law which set the parameters for their existence. Is it your thought that absent the Federal law we could have had PAC's but people did not get around to forming them, but they had a constitutional right to do so because the Congress could not eliminate them?

Mr. **Cutler**. The law legitimatizing PAC's, Senator Specter, modified previous law banning any political contribution to a Federal campaign by a corporation or a labor union. So as to permit corporations and labor unions to cover the administrative expenses of a PAC. They still cannot put up money from the corporate treasury for you or for your opponent, but they can finance a PAC, the administrative cost of a PAC to which individuals in the company of their own free will, in quotes, will contribute money and then that is dispensed by the PAC.

I think it would be constitutionally not permissible, certainly under the *Buckley* decision, to bar the people who want to advocate a balance-the-budget amendment or set a limit on taxes or anything else from organizing a committee to support or oppose Senator Specter.

Senator SPECTER. So that Congress could alter the ability of corporations or unions to pay administrative costs?

Mr. CUTLER. Yes, and that would probably have a major effect on the total amount of money spent by PAC's.

Senator SPECTER. But not to curtail in your opinion under the Constitution individuals from forming together in groups calling themselves political action committees to raise money?

Mr. CUTLER. They are truly within the rules set forth in the *Buckley* case.

Senator SPECTER. Under your proposed amendment we could do that?

Mr. CUTLER. Under our proposed amendment you could limit total expenditures. We are not proposing any change in the *Buckley* rules about contributions and *Buckley* in effect balanced first amendment rights against the public interest in the integrity of the electoral process to say the $1,000 limit seemed reasonable to them as within the range of what Congress could do. A $10 limit or a discriminatory limit of some kind clearly would have been thrown out, either on first amendment grounds or 14th amendment grounds. What we are proposing simply is that for expenditure limits the same sort of balancing test be authorized.

The Supreme Court in *Buckley* found that the evidence as to the connection between political corruption and total expenditures just was not there and that is why they struck down the expenditure limit. We certainly think the Supreme Court should have the right to strike down unreasonable expenditure limits as, for example, discriminatory ones or ones which left a candidate only with, let us say, the money for one political broadcast or a limit which did not index for inflation.

All the first amendment interests would continue to be balanced against the obvious constitutional interest in the integrity of the electoral and legislative process.

Senator SPECTER. Professor Dellinger, you have commented about the amendments. Do I understand—do you intend on the sheet you handed to us, number four Dellinger, to be the proposed amendment which you think is preferable to even the Cutler amendment—let me finish my sentence—even preferable to the Cutler proposal?

Mr. DELLINGER. I am not certain by any means that my suggestion is preferable to Mr. Cutler's. I was attempting to spell out what I think the intended effect of the Cutler proposal is—and I think Lloyd stated it very crisply just now. The least intrusive amendment would be one which provided that the Court should apply the same standard of review to expenditure limits as the Court itself applied in sustaining contribution limits. I think that is really the thrust of the amendment that Mr. Cutler proposed. I was just trying to flush out what one might mean by "reasonable limits". The only difficulty I see with the proposal that Congress be allowed to set "reasonable limits" is the possible rejoinder. "How could a limit be reasonable if it violated the first amendment as construed by the Court in *Buckley* v. *Valeo*?" I would suggest that what we mean by reasonable is something on the order of those limits that are necessary to advance substantial and legitimate governmental interest.

What we should seek, Senator Specter, is an amendment that recognizes that judicial umpiring of the process of regulating campaign expenditures is essential, and that does not, as Senate Joint Resolution 21 would, oust the Court from its process of umpiring but would suggest to the Court that the proper constitutional standard ought to be one that acknowledges there is a speech enhancing aspect to limiting expenditures.

Senator **SPECTER**. I am somewhat troubled. I am not sure, but I am at least troubled at the moment about the use of the word reasonable. I can understand the Court saying to be sure we do not have the power to curtail newspapers commenting. I heard your example of $1 million versus $1.29, and I would think notwithstanding a constitutional amendment which did not have the word reasonable, that would be reachable to the courts under equal protection.

But if the Congress makes a determination as to what the dollar amounts are, why should it be subject to judicial review on that?

Mr. **CUTLER**. If I may interject on that a moment, Senator Specter, the Court gives very wide latitude to number limits.

Senator **SPECTER**. They may or may not.

Mr. **CUTLER**. Such as the $1,000.

Senator **SPECTER**. They may or may not in the future. How about a little balance of power? Why do we have to limit that subject? Why do we have to limit all the subjects to the Court's interpretation of reasonable? Are we without reason in the Congress?

Mr. **CUTLER**. You obviously are not without reason in the Congress and 99 times out of 100 the Court accepts limits of this type that you set. We are trying to protect these first amendment rights.

Senator **SPECTER**. We do not accept what the Court does 99 out of 100. We have to accept it 100 times out of 100 unless we go the cumbersome route of a constitutional amendment. It comes down to the issue you have reasonableness and we are talking about dollar amounts. Why should the Congress defer to the Court?

Mr. **DELLINGER**. I think, Senator, because it has been an important aspect of the continuing sense of legitimacy of the American Government that there has been a relatively disinterested judicial umpire to scrutinize the process of election and its regulation.

Senator **SPECTER**. That is fine under equal protection, but why under reasonableness as to amount?

Mr. **CUTLER**. Suppose that Congress decided that there should in effect be no more money than would pay for one television program, one-half hour. That it seems to me would pose a serious first amendment problem. Is there enough of a connection——

Senator **SPECTER**. Suppose Congress does that, Mr. Cutler, and the Court upholds it. You can suppose anything. But why suppose a ridiculous congressional result? Why suppose greater wisdom flows from the Court than Congress on that very narrow issue?

Mr. **CUTLER**. I would happily give up the word "reasonable" because I think the Court would read it back in again.

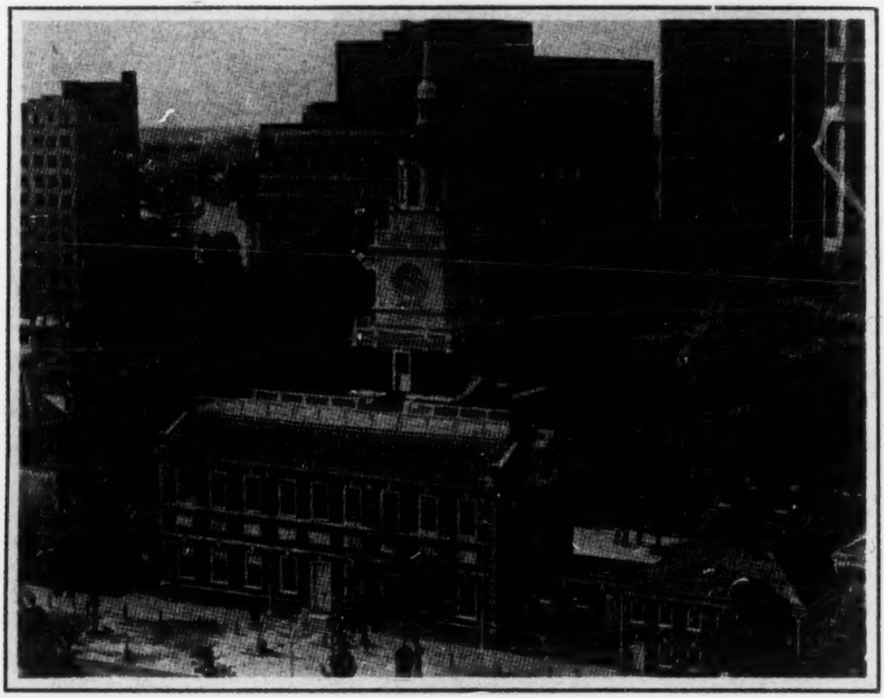
Senator **SPECTER**. The hearing is adjourned. Thank you very much.

Mr. Cutler. Before you adjourn, could I ask to have inserted in the record the booklet by the Committee on the Constitutional System, "A Bicentennial Analysis of the American Political Structure."

[The CCS booklet follows:]

A Bicentennial Analysis of the American Political Structure

Report and Recommendations of the Committee on the Constitutional System



January 1987

The Committee on the Constitutional System is a non-partisan, non-profit organization devoted to the study and analysis of the American constitutional system as it nears its 200th anniversary. The Committee's participants include present and former Senators and Representatives, members of the Cabinet and White House staff, officials of the national and state political parties, state governors, university and college presidents, journalists, lawyers, historians, political scientists, labor officials, business and financial leaders, and other interested citizens across the nation.

The Committee is co-chaired by **Senator Nancy Landon Kassebaum** (Republican of Kansas), **C. Douglas Dillon,** former Secretary of the Treasury and Under Secretary of State, and **Lloyd N. Cutler,** former Counsel to the President. Its Board of Directors is listed on the inside back cover.

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Board of Directors .... inside back cover

Cover: Independence Hall, against the background of modern Philadelphia.
(Photo courtesy of Independence National Historical Park)

COMMITTEE ON THE CONSTITUTIONAL SYSTEM
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Two hundred years ago, the founders of the American republic decided that the governmental system that had guided them safely through the War for Independence was in need of change. They became convinced that nothing short of a new constitution would meet the demands that lay ahead.

Having reached this conclusion, they did not hesitate to take the necessary action. The result was the framing and ratification of the United States Constitution.

As we approach the bicentennial of the Constitution, Americans are eager to honor the framers' work, which is truly one of the great achievements of human history.

The system designed in 1787 has proven remarkably adaptable to the changing demands of a growing nation. Political leaders have been imaginative and bold in finding ways to adapt the system to meet evolving national responsibilities and needs. Hamilton, Jefferson and Madison themselves took the lead in creating the party system, building greater cohesion and efficiency into the lawmaking process.

As the United States shifted from an agricultural to an industrial society and the regulation of commercial and financial markets became too complex for a government of separated powers, a later generation of politicians invented the independent regulatory commission, combining rule-making, administrative and adjudicatory powers in a single governmental body.

During the 1930's, new signs of strain began to appear. In response to the Great Depression, the government embarked on a vast set of programs to manage the growth of our modern industrial economy and provide a measure of social justice for those who suffered from its malfunctions. Then dangerous challenges to American security arose in Europe and the Far East and in our own national defense, and we had to assume global military and foreign policy responsibilities. These developments, domestic and foreign, required the federal government to undertake new tasks that were unprecedented in kind or scope and could hardly have been foreseen by the framers.

Thoughtful observers soon realized that the governmental structure was straining under this enormous additional load. A series of commissions chaired by Louis Brownlow, Herbert Hoover and Roy Ash made sweeping recommendations that became the basis for extensive modernization of the executive branch. Distinguished panels in the Senate and House chaired by Mike Monroney and Robert LaFollette, Jr., Richard Bolling, Adlai Stevenson III and William Brock brought about important changes in the procedures and committee structure of Congress. Groups outside the government (such as the National Academy of Public Administration, the Committee on Political Parties of the American Political Science Association and the Committee for Economic Development), as well as individual analysts and authors, offered other suggestions for reform.

Though most of these studies confined themselves to recommending adjustments within the existing framework, many recognized that the twentieth-century problems confronting our eighteenth-century American political system might require changes in the constitutional structure. Changes in statutes and party rules are of course less difficult to make and ought to be tried before changes in the Constitution itself. Changes in the Constitution should not be shunned, however, if critical modern problems cannot be solved by other means.

In the last Federalist Paper, Alexander Hamilton urged that the Constitution be ratified despite the objections that were being raised, because there would be opportunity later to make amendments as experience revealed the need. James Madison and Gouverneur Morris likewise acknowledged imperfections in the framers' brilliant work.

For example, the same document that established the Bill of Rights also countenanced the continued practice of slavery. When that contradiction became apparent over the next century, the resulting constitutional crisis produced a terrible civil war. Abraham Lincoln called a distracted nation to attention with the words, "We must disenthrall ourselves." "The dogmas of the quiet past," he added, "are inadequate to the stormy present. . . . As our case is new, so we must think anew, and act anew." And the Constitution was amended to outlaw slavery, root and branch.

Thomas Jefferson considered the amendment process one of the Constitution's most important features. "I am certainly not an advocate for frequent and untried changes in laws and constitutions," he wrote. "But I know also that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also and keep pace with the times."

As Jefferson foresaw, we too face unprecendented challenges. If aspects of the system framed in 1787 prevent the national government from meeting its present responsibilities, we must identify the outmoded features, separate them from the good and durable parts of the system and make the necessary modifications.

To do so is not to reject the great work of our forebears. It honors their spirit in the most sincere way: by seeking to emulate it.

SIGNS OF STRAIN

As the bicentennial draws near, the signs of strain in our governing processes are unmistakable.

Perhaps the most alarming evidence is the mounting national debt, fueled anew each year by outsized and unsustainable deficits that defy the good intentions of legislators and Presidents.

Consistency in our foreign and national security policies is also frustrated by an institutional contest of wills between Presidents and shifting, cross-party coalitions within the Congress. Over forty treaties submitted to the Senate for ratification since World War II have either been rejected or have never come to a vote. Among those that have never come to a vote are SALT II, the 1974 and 1976 treaties on underground nuclear tests and explosions, maritime boundary treaties with Mexico and Canada, several UN and OAS human rights conventions, and a wide variety of bilateral trade, tax and environmental treaties. Meanwhile presidential concern over "leaks" and frustration with congressionally imposed restrictions have led Presidents and their staffs to launch important diplomatic, military and covert activities in secret and without consulting Congress.

Further problems — particularly damaging in a nation dedicated to the principle of self-government — stem from malfunctions of the modern electoral system: the high cost of running for office, the corroding influence of campaign contributions from single-interest groups, the stupefying length of campaigns (for the presidency, usually several years from initiation to inauguration), and persistently low turnout rates (among the lowest in the world for nations with competitive elections).

CAUSES

Sensing the failures and weaknesses in governmental performance, people tend to blame particular politicians or the complexity of the modern world. But our public officials are no less competent, either individually or as a group, than they used to be. Nor do our problems, as complex as they are, defy rational solutions consistent with our basic constitutional liberties. The difficulty lies mainly in the diffuse structure of the executive-legislative process and in the decline of party loyalty and cohesion at all levels of the political system.

The separation of powers, as a principle of constitutional structure, has served us well in preventing tyranny and the abuse of high office, but it has done so by encouraging confrontation, indecision and deadlock, and by diffusing accountability for the results.

Ideally our two-party system should counteract the centrifugal tendencies of the separation of powers, with each party's politicians committed to a common philosophy of government and to specific program goals for which they stand accountable at the next election. In fact, throughout most of the nineteenth century and until after the end of World War II, the loyalty of most politicians to their party was deeply felt. They ran for office on a ticket selected by the party's leaders. Once in office, they recognized a common stake in the success of their party's governance and their joint accountability as candidates of the party at the next election.

In recent decades, however, political reforms and technological changes have worked together to weaken the parties and undermine their ability to draw the separated parts of the government into coherent action. Beginning in the late nineteenth century, Congress enacted a series of measures that redistributed functions previously performed by the parties. Civil service systems stripped the parties of much of their patronage.

The rise of the welfare state took away many opportunities for service by which the parties had won and held the loyalty of their followers. The secret ballot replaced the "tickets" which had previously been prepared by the parties and handed to the voters to cast into the ballot box. The 17th Amendment (ratified in 1913), which required the direct election of Senators, dealt another blow to party cohesiveness. So did the direct primary, which came to dominate the nomination of presidential candidates, particularly after 1968.

Modern technology has enabled candidates to appeal to voters directly, through television, computer-assisted mailings and telephone campaigns, and by quick visits in jet airplanes, all of which have lessened their dependence on party organizations and leaders. The key to these technologies is money, but candidates found they could raise it directly for themselves better than through the party organization. At the same time, interest groups found they could exercise more power over legislative votes by contributing directly to selected candidates rather than to a party.

The habits of voters also changed in this new environment. Party loyalty had been the rule for most of the nineteenth century, but by the last quarter of the twentieth century, one-third of all voters were registered as independents, and even among voters registering with parties, ticket-splitting became the norm.

Many of these changes resulted from laudable reforms and were, in any case, inevitable. No one wants to roll the clock back to the time when party bosses and local "machines" dominated the political process.

Nevertheless, we need to recognize that the weakening of parties in the electoral arena has contributed to the disintegration of party cohesion among the officials we elect to public office. Members of Congress who owe their election less to their party than to their own endeavors and their own sources of funds have little incentive to cooperate with party leaders in the Congress, much less their party's incumbent in the White House. And the proliferation of congressional committees and subcommittees has increased the disarray. There are now so many that almost every member is the chairman or ranking minority member of at least one committee or subcommittee, with all the political influence, proliferating staffs, publicity and fund-raising potential needed to remain in office.

EFFECTS

Because the separation of powers encourages conflict between the branches and because the parties are weak, the capacity of the federal government to fashion, enact and administer coherent public policy has diminished and the ability of elected officials to avoid accountability for governmental failures has grown. More specifically, the problems include:

BRIEF HONEYMOONS. Only the first few months of each four-year presidential term provide an opportunity for decisive action on domestic problems. By the second year, congressional incumbents are engrossed in the mid-term election and defer difficult decisions that will offend any important interest group.

The mid-term election usually results in a setback for the President's party that weakens his leadership and increases the stalemate and deadlock in the Congress. After the mid-term election, the government comes close to immobility as the President and Congress focus their energies on the imminent presidential election.

DIVIDED GOVERNMENT. We have had divided government (one party winning the White House and the other a majority in one or both houses of Congress) 60 percent of the time since 1956 and 80 percent of the time since 1968, compared to less than 25 percent of the time from the adoption of the Constitution until World War II.

This has led to inconsistency, incoherence and even stagnation in national policy. Affirmative policy decisions, as well as the **non**decisions resulting from frequent deadlocks that block any action at all, are reached by shifting majorities built out of cross-party coalitions that change from one issue to the next.

Divided government in turn reflects the decline in party loyalty and the growing practice of ticket-splitting among the electorate. In 1900 only four percent of all congressional districts were carried by one party's presidential candidate and the other party's candidate for Member of the House. By 1984, because of the growth of ticket-splitting, this happened in 44 percent of all congressional districts.

One of Woodrow Wilson's themes during the campaign of 1912 — a time of divided government — was that only party government (with one party successfully bridging the separated powers by winning control of the Presidency and both houses of Congress) could carry a coherent program into effect. The voters in 1912 responded by choosing party government, and Wilson's New Freedom program was successfully legislated.

LACK OF PARTY COHESION IN CONGRESS. Even in times of united government, disunity persists between the branches — and between and within the two houses of Congress — because many members of both the President's party and the opposition party reject the positions taken by their leaders. Legislators today have less reason to stick with their party's position and more reason to follow the urgings of non-party political action committees, which provide more of their campaign funds than the party does. The summary rejection of President Reagan's budget in 1986, even by members of his own party in the Republican-controlled Senate, dramatically illustrates the lack of party cohesion in the current political environment. This lack of cohesion induces Presidents and their staffs, as noted above, to conceal important foreign policy initiatives even from the leaders of their own party in Congress.

LOSS OF ACCOUNTABILITY. Divided government and party disunity also lead to diffused accountability. No elected official defends the sum of all the inconsistent policy decisions made by so many shifting cross-party coalitions, and each successfully shifts the blame to others. Polls show the public is dissatisfied with the governmental institutions — especially Congress and the bureaucracy — that legislate and administer this hodge-podge of policies. But the public seldom holds a party accountable for these failures, and it hardly ever holds individual legislators responsible.

Since World War II, 90 percent of each party's incumbent legislators who sought another term have been reelected, even in years when their party lost the White House. In 1986 the figure was 97 percent. Benjamin Franklin's famous maxim, "We must all hang together, or assuredly we shall all hang separately," no longer applies to the Members of Congress of either party.

LACK OF A MECHANISM FOR REPLACING FAILED OR DEADLOCKED GOVERNMENT. Presently there is no way between our fixed election dates to resolve basic disagreements between the President and Congress by referring them to the electorate. The only way to remove a failed President is by a House impeachment and Senate trial for "treason, bribery, or other high crimes and misdemeanors." And between the fixed election dates there is no way to reorient a Congress in which one or both houses obstruct an important and popular presidential program.

REMEDIES

In seeking to adjust the constitutional system to modern conditions, we must be careful to preserve its enduring virtues. We must continue to respect the Bill of Rights, protected by an independent judiciary, and we must continue to insist that elected officials be able to monitor one another's performance and call one another to account.

Consistent with these principles, it should be possible to design improvements that would encourage party cohesion and lessen the deadlock between the executive and legislative branches without sacrificing essential checks and balances. The Committee on the Constitutional System offers the following proposals as sufficiently meritorious to warrant national consideration and debate. Some of these proposals call only for adopting new party rules or statutes, while others would require amendments to the Constitution.

PROPOSALS WHICH COMMAND MAJORITY SUPPORT AMONG OUR MEMBERSHIP

Strengthening Parties as Agents of Cohesion and Accountability

1. THE PARTY PRESIDENTIAL NOMINATING CONVENTION

The parties should amend their rules for the presidential nominating conventions so as to entitle all winners of the party nominations for the House and Senate, plus the holdover Senators, to seats as uncommitted voting delegates in the presidential nominating convention. This would give the congressional candidates of the party a significant voice in selecting the presidential candidate, increase the loyalties between them in the election campaign, improve cohesion between the President and the legislative incumbents of his party and tend to make them jointly accountable to the voters in the next election.

2. OPTIONAL STRAIGHT-TICKET BALLOTING

Congress should enact a statute requiring all states to include a line or lever on federal election ballots enabling voters, if they so desire, to cast a straight-line party ballot for a party's candidates for all open federal offices.

A recent survey shows that nineteen states, including Illinois, New York and Pennsylvania, already have such statutes and that ticket-splitting is less common in those states. This would encourage party loyalty at the voter level and among a party's federal candidates. To the extent that it reduced ticket-splitting, it would lessen the likelihood of divided federal government, while still leaving voters free to split their tickets if they chose.

3. PUBLIC FINANCING OF CONGRESSIONAL CAMPAIGNS

Congress should amend the campaign financing laws to create a Congressional Broadcast Fund similar to the existing Presidential Campaign Fund. This fund would be available to each party under a formula similar to that used for the Presidential Campaign Fund, on condition that the party and its candidates expend no other funds on campaign broadcasts. Half of each party's share would go to the nominees themselves. The other half would go to the party's Senate and House campaign committees, which could apportion the funds among candidates so as to maximize the party's chances of winning a legislative majority.

By requiring candidates to look to the party for a substantial part of their broadcast funds, this proposal would help to build party loyalty and cohesion. It would also provide a constitutional way of limiting expenditures on the largest single component of campaign financing costs.

Improving Collaboration Between the Executive and Legislative Branches

1. FOUR-YEAR TERMS FOR HOUSE MEMBERS AND EIGHT-YEAR TERMS FOR SENATORS, WITH FEDERAL ELECTIONS EVERY FOURTH YEAR

The present system of staggered elections has the effect of pulling the branches apart. Members of the House, who run every two years, feel a political need to demonstrate their independence from the White House, particularly in off-year elections. So do the one-third of the Senators who face an election within two years. Every other time an incumbent in either house runs for reelection, there is no presidential campaign.

The effect is to encourage legislators to distance themselves from the President and from presidential programs that may involve a difficult, short-term adjustment on the way to a worthwhile, longer-term result.

The Constitution could be amended so that the President and Members of the House would serve concurrent, four-year terms, and one Senator from each state would be elected for an eight-year term at each presidential election. This would eliminate the present House and Senate elections in the middle of the presidential term. It would lengthen and coordinate the political horizons of all incumbents. Presidents and legislators could join to enact necessary measures with the promise of longer-run benefits, without having to worry about an imminent election before the benefits were realized.

With fewer elections, the aggregate cost of campaign financing should go down, and legislators would be less frequently or immediately in thrall to the interest groups on whom they depend for funds. The honeymoon for enacting a President's program would be longer. With a four-year life for each Congress, the legislative process for the budget and other measures could be made more orderly and deliberate.

Alternatives: If the eight-year term for Senators were deemed too long, the Senate term could be shortened to four years, concurrent with the terms of the President and the House, which would also eliminate the mid-term election. Or, if the Senate would not accept a shortened term, we could keep the present six-year term. This would retain a limited mid-term election (for one-third of the Senate), permitting a partial referendum on government policy, at the cost of shortening the political horizon of one-third of the Senate.

2. PERMITTING MEMBERS OF CONGRESS TO SERVE IN THE CABINET

The Constitution now bars members of Congress from serving as heads of administrative departments or agencies or holding any other executive-branch position. This provision was intended to prevent the President from dominating Congress by offering executive positions to key legislators. But its principal effect has been to deprive the nation of administrators who would have the confidence of both the executive and legislative branches.

If the barrier were removed from the Constitution, Presidents would have the option of appointing leading legislators to cabinet positions, and legislators would have the option of accepting such offers, without being required to give up their seats in Congress. Such ties between the branches might encourage closer collaboration and help to prevent stalemates. They would broaden both the range of talent available to a President in forming his administration and the base of political leadership in the executive branch.

Under such an amendment, of course, a President would not be obliged to appoint any members of Congress to his cabinet, nor would they be obliged to accept.

Woodrow Wilson strongly favored this amendment, as a means to encourage closer collaboration between the branches. While modern legislators may have less time and incentive to join the cabinet than earlier generations, there is no longer any reason for a constitutional barrier to an experiment that has considerable promise and little risk.

3. RELAXING THE REQUIREMENTS FOR TREATY RATIFICATION

The ability to enter into formal agreements with other nations is vital to effective national government in an increasingly interdependent world. The present constitutional requirement that treaties require the approval of two-thirds of the Senate has been a major barrier to the use of treaties and has led to evasion of the treaty process by way of executive agreements.

To restore an appropriate congressional role in the making of agreements with foreign powers, this provision should be amended to require that treaties can take effect with the approving vote of a constitutional majority of both houses. If the Senate does not join in proposing such an amendment, it should at least approve an amendment reducing the present requirement of approval by two-thirds of the Senate to 60 percent.

Reducing the Costs of Campaigning for Election

The lack of any legal limit on total campaign expenditures has led to a spiraling, competitive escalation in campaign costs. In the 1986 midterm election, the legislative candidates raised and spent $342 million, up 30 percent over 1984. The cost of campaigning has put a contested seat in Congress beyond the means of everyone who is not either personally wealthy or willing to become dependent on well-heeled special interest groups. The Supreme Court's interpretation of the First Amendment seems to prohibit Congress from limiting private campaign expenditures by legislation, although the Court has authorized public financing on the condition that candidates who accept it limit their expenditures to these federal funds.

A constitutional amendment allowing Congress to set reasonable limits on campaign expenditures would not endanger the freedom of expression guaranteed by the First Amendment. If such an amendment were adopted, many able citizens who now reject the idea of standing for election might be attracted to political office, and the divisive influence of interest group contributions might be reduced to the point where more cohesive government would again become feasible.

ADDITIONAL PROPOSALS WORTH CONSIDERING

The changes recommended in the previous section command majority support among members of the Committee on the Constitutional System. A number of other ideas have found less than majority support to date, but some members believe they are important enough to deserve further discussion. They fall into four categories.

Strengthening Party Cohesion and Party Accountability

1. ENCOURAGING PRESIDENTIAL APPEARANCES BEFORE CONGRESS

Congress and the President should work out mutually agreeable voluntary arrangements for periodic presidential appearances before major congressional committees. These appearances would be used to present presidential positions and to answer congressional questions about presidential actions and proposals. Such arrangements would be consistent with the provision in Article II that the President "shall from time to time give to the Congress information on the State of the Union." They would also encourage greater cohesion between the President and the members of his party in Congress.

2. CREATING A SHADOW CABINET FOR THE LEGISLATIVE OPPOSITION

Legislators of the party losing the presidential election should organize a "shadow cabinet." The party's leaders in each house might alternate annually as leader and spokesman of the shadow cabinet, and the party's chairman or ranking member of the major committees in each house might alternate annually as shadow spokesmen in their particular fields, with their counterparts in the other house serving as deputy spokesmen. The shadow cabinet could coordinate party positions on legislative issues and act as party spokesmen before the public.

Reducing the Likelihood of Divided Government

For 20 of the last 32 years — and for 14 out of the last 18 — the White House and at least one house of Congress have been controlled by opposing parties. Some of the measures suggested above should reduce the likelihood of divided government, but they may be insufficient to eliminate it. If divided government is recognized as the preeminent cause of interbranch conflict and policy stalemate and deadlock, two stronger approaches are worth considering.

1. MANDATORY STRAIGHT TICKETS

The first approach is to make straight-ticket voting not merely easier, as suggested above, but compulsory. By constitutional amendment, each party's nominees for President, Vice President, Senate and House could be placed on the ballot as a single slate, with the voter required to cast his or her vote for one of the party slates in its entirety.

The drawback to this idea is that Americans are strongly committed to voting for the person rather than the party. They would not be easily convinced to sacrifice this freedom in the interest of party loyalty and cohesion.

2. SEQUENTIAL ELECTIONS

The second approach is for Congress to enact a statute providing for sequential elections in presidential years, with the voting for President and Vice President to be conducted two to four weeks before the voting for members of Congress. Under such a proposal voters would already know, at the time they balloted for members of Congress, which party they have entrusted with the presidency. This would give the newly elected President an opportunity to persuade voters to elect a majority of the same party to Congress and thus give the party a better opportunity to carry out its program.

The drawbacks here are that in the congressional election Americans might still vote for the person rather than the party. Also, there would probably be a considerable fall-off in the number of voters in the congressional election.

Calling New Elections in the Event of Deadlock or Governmental Failure

If it were possible for a President to call new elections, or for Congress to do so, we would have a mechanism for resolving deadlocks over fundamental policy issues. Indeed, the very existence of such a mechanism would be an inducement to avoid a deadlock that could trigger new elections. It would also make it possible to reconstitute a government that had palpably failed for any other reason.

There are formidable obstacles to incorporating such a device in our present system. Should the President alone, or Congress alone, or both the President and Congress be empowered to call for new elections? How soon should they follow after the passage of the resolution calling for them? Are we prepared to vote in a month other than November? Should there be full new terms for the winners (perhaps adjusted to the regular January expiration dates), or should they fill just the unexpired terms?

These questions can probably be answered. The real questions are whether we need such a strong device for breaking deadlocks or for removing Presidents who have failed for reasons other than impeachable conduct, and whether it is likely that in a special election the electorate would break the deadlock or would simply reelect all the incumbents.

Most constitutional democracies employ such a device, and it deserves serious consideration. It is not inconsistent with separated powers, and it might well operate to encourage cooperation between the branches in order to forestall the ordeal of special elections.

Reexamining the Federal-State Relationship

The weaknesses of the federal government are in large part the result of overload. This overload could be lessened by a better division of responsibility among federal, state and local governments.

A special convocation could be held every ten years with delegates to be selected in equal numbers by federal, state and local governments in a manner to be determined by Congress, to make recommendations to achieve a more cooperative, equitable, efficient, accountable and responsive federal system, under procedures requiring Congress and the state legislatures to vote on each recommendation.

MINORITY PROPOSAL FOR A POSSIBLE PACKAGE

Further discussion of these measures, and others that may be advanced, may well produce a package offering total benefits greater than the sum of the individual parts.

Some of our members believe, for example, that the following measures could be combined into a desirable package.

1. Adopting four-year terms for House members and eight-year terms for Senators, with elections in presidential years.

2. Empowering the President (perhaps with the consent of a specified number of members of one or both houses) or the Congress (by a special or regular majority of both houses, or perhaps even by an absolute majority of the members of one house) to call for a prompt election to all federal offices for new, full terms.

3. Permitting the President to appoint members of Congress to the executive branch without requiring them to give up their seats.

4. Allowing Congress, by constitutional amendment, if necessary, to place reasonable limitations on the total that may be spent in a political campaign.

5. Holding a federal-state-local convocation every ten years to make recommendations for improving the federal system.

A WORD ABOUT PROCEDURES

Article V of the Constitution sets forth two procedures for amending the Constitution. The first is for Congress, by two-thirds majorities of both houses, to submit proposed amendments for ratification by the states. The second is for the legislatures of two-thirds of the states to petition Congress to call a convention for the purpose of proposing amendments. In either case, the proposed amendments do not become part of the Constitution until ratified by three-quarters of the states.

The former method has been used for each of the twenty-six amendments currently in the Constitution. It is a proven way to insure thoughtful consideration for proposed reforms.

The only time in American history when the alternative method may have served a useful purpose was in the drive for the 17th Amendment, which provided for the direct election of United States Senators. Resistance to passage in the Senate led backers to attempt the alternate route. Eventually, the Senate capitulated and helped to frame a congressional resolution that was subsequently ratified.

The Committee on the Constitutional System strongly favors the traditional congressional method for proposing constitutional amendments. We hope that Congress will soon initiate a study to determine whether the Constitution in its present form can provide effective, accountable government for a third century, whether perceived weaknesses in our political structure can be remedied by changes in party rules and statutes, or whether changes in the Constitution itself may be desirable.

RESOURCES FOR FURTHER STUDY

The Committee on the Constitutional System has assisted in the preparation of two volumes for use by civic groups, educational institutions and others who wish to consider the reform of the American political system.

Reforming American Government, edited by Donald L. Robinson and published in 1985 by Westview Press, of Boulder, Colorado, presents a set of papers which the Committee has used in its own deliberations. It contains essays on the current effectiveness of our governing institutions, the texts and analyses of various proposed amendments (including several which are not listed in this pamphlet), and a bibliography on constitutional reform.

Constitutional Reform and Effective Government, written by James L. Sundquist in consultation with various Committee members and published in 1986 by The Brookings Institution, of Washington, D.C., provides a careful analysis of the leading proposals for constitutional reform, including their history and an assessment of their likely effects.

CONCLUSION

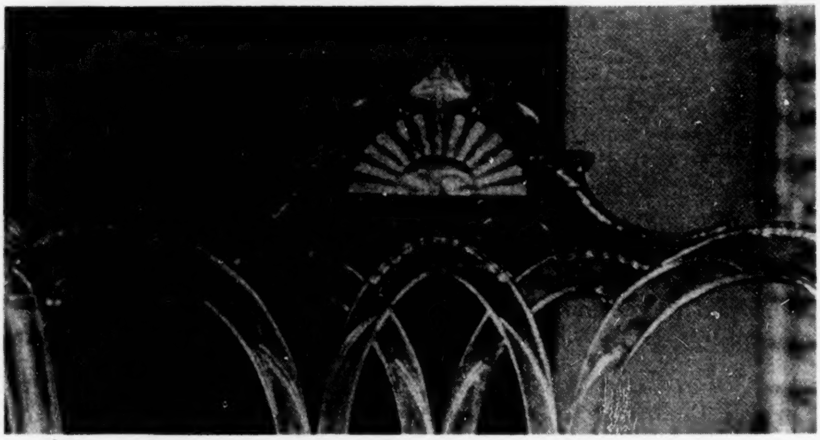
In presenting this analysis and list of proposals, the Committee wishes to stress its central conviction. The best way to honor the framers of the Constitution during this bicentennial era is to follow their example.

When the parlous state of affairs under the Continental Congress raised doubts about the fitness of the new nation's frame of government, George Washington and his associates took steps to meet the challenge. They adopted the changes necessary (in the words of the resolution that called the Convention of 1787 into being) to "render the federal constitution adequate to the exigencies of government and the preservation of the union."

Two hundred years later, we stand in awe of their achievement. We disserve their memory, however, if we ignore signs that our political system today faces challenges that it is not equipped to meet.

We need to face up to these shortcomings in the capacity of our two-hundred-year-old political structure to cope with a global economy and prevent a nuclear war. We may ultimately conclude that these shortcomings can be remedied without major structural changes, or that any major changes needed to correct them would create even greater problems. But we cannot be confident of having reached the right conclusions until we confront the problems, trace them to their roots and examine the alternatives.

It is in this spirit that we offer these proposals.



Rising Sun chair, used by George Washington
while he presided over the Constitutional Convention.
Independence National Historical Park Collection.

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Senator **Specter**. We appreciate your coming. You are all veterans of these hearings, and you know we always hear Senators and Congressmen first. We thank you for your diligence, your erudition and your statements, and we are grateful to you for your support. And I am seriously considering at this moment putting in your proposed Senate joint resolution, Mr. Cutler, unless Professor Gora overpowers me or suggests something better, and I am not yet sure as to whether it is reasonable to strike reasonable.

Mr. **Cutler**. I will be happy to strike reasonable.

Senator **Specter**. The subcommittee is adjourned.

[Whereupon, at 11:50 a.m., the subcommittee adjourned subject to the call of the Chair.]

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